THE UNIVERSITY OF HULL

The Debate on Public Opinion and Judicial Impartiality in Mainland China – A Critical Review from a Comparative Perspective

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ABSTRACT

In recent years in mainland China, a number of high profile cases have caused a stir amongst the public and triggered concern on the part of Chinese scholars about the negative influence of public opinion on judicial impartiality and judicial independence: a concern evident in a significant amount of research literature published in Chinese. This thesis is inspired by this debate and aims to critically review how far the assumptions on which it is based can stand. It applies a social-legal approach to examine the theoretical issues involved in this debate in China's distinctive social, cultural, political and systemic contexts. It is not an empirical study of public opinion in China, but rather aims to develop a contextualized understanding of the normative issues at stake. It argues that public opinion itself is subject to various influences and that the substance of what is meant by the term "public opinion" depends on circumstances and contexts. Chinese scholars have employed a number of rhetorical themes or *topoi* which are also used in, or originated from, Anglo-American jurisprudence and other western legal literature. Some of the relevant legal values are also established by the letter of Chinese law or/and are argued for by Chinese scholars. Therefore, this thesis has conducted its critique from a comparative perspective in order to advance the understanding of the variation of the substance of the relevant legal values and institutions which appear to be rhetorically the same in different contexts.

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(2003) Criminal Review No. 5 （2003）刑提字第 5 号.

(2005) Shizuishan Criminal First Instance No. 16 （2005）石刑初字第 16 号.

(2008) Angkang Intermediate Criminal Final No. 91 （2008）安中刑终字第 91 号.

(2008) Shanghai HPC Criminal Final No. 131 （2008）沪高刑终字第 131 号刑事裁定书.

(2008) Shanghai Second IPC Criminal First Instance No. 99 （2008）沪二中刑初字第 99 号.

2. UK cases

Director General of Fair Trading v Proprietary Association of Great Britain [2001] 1 W.L.R. 700.

R. v Salt (Frederick Arthur) [1996] Crim. L.R. 517.

Scott v Scott [1913] AC 417 (HL) 463.

The King v Sussex Justices [1924] 1 K.B. 256.

3. US cases

Republican Party of Minnesota v White 536 U. S. 765 (2002).

4. Canadian cases

McPherson v McPherson [1936] AC 177.

5. The European Court of Human Rights cases

Findlay v United Kingdom (1996) 21 EHRR CD7.

Higgins and Others v France (1999) 27 EHRR 703.

Morris v United Kingdom (2002) 34 EHRR 52.

TABLE OF LEGISLATION

1. Legislation of the PRC and the title in simplified Chinese

Administrative Procedure Law of the PRC. 中华人民共和国行政诉讼法

Civil Procedure Law of the PRC. 中华人民共和国民事诉讼法

Constitution of the PRC. 中华人民共和国宪法

Criminal Law of the PRC. 中华人民共和国刑法

Criminal Procedure Law of the PRC. 中华人民共和国刑事诉讼法

Judges Law of the PRC. 中华人民共和国法官法

Law of the Structure and Framework of the People’s Courts of the PRC.

中华人民共和国法院组织法

Law of the Structure and Framework on the Local People's Congresses and Local People's Governments of the PRC.

中华人民共和国地方各级人民代表大会和地方各级人民政府组织法

Law on Legislation of the PRC. 中华人民共和国立法法

2. Legislation of the UK

Contempt of Court Act 1981.

Criminal Justice Act 2003.

3. International treaties and other international official documents

European Convention for the Protection of Human Rights and Fundamental Freedoms (The European Convention on Human Rights).

International Covenant on Civil and Political Rights.

UN Basic Principles on the Independence of the Judiciary.

Universal Declaration of Human Rights.

GLOSSARY ONE

TERMS IN SIMPLIFIED CHINESE AND THEIR ENGLISH TRANSLATION IN THIS THESIS

(AND ABBREVIATIONS WHERE APPLICABLE)

Terms in simplified Chinese	English translation in this thesis	Abbreviation
错案责任追究制度	accountability system of misjudged cases	
审判委员会	adjudication committee	
质询案	bill of addressing inquiries	
中共中央文献研究室	CCCPC Party Literature Research Office	
中国共产党中央纪律检查委员会	Central Commission for Discipline Inspection of the CPC	CCDICPC
中共中央	Central Committee of the CPC	CCCPC
法庭庭长	chief justice of the tribunal	
中国人民政治协商会议	Chinese People's Political Consultative Conference	CPPCC
合议庭	collegiate panel	
公捕公判大会	combined rallies of public announcement of arrest and sentencing	
劳教委	Committee of the Re-education through labour	
中国共产党	Communist Party of China	CPC
儒家	Confucian, Confunciamism	
中国传统法律的儒家化	confucianlization of traditional Chinese law	

刑事拘留	criminal detention	
派出法庭	dispatched tribunal (of a primary court)	
钓鱼执法	entrapment	
中共中央办公厅	General Office of the CPC	
国务院办公厅	General Office of the State Council of the PRC	
中央总书记	General Secretary of the Central Committee of CPC	GSCCCPC
君子	gentlemen of good moral character and behaviour	
依法治国	governing the country according to law	
以德治国	governing the country by virtues	
人民大会堂	Great Hall of the People	
高级人民法院	Higher People's court	HPC
看守所	house of detention	
中级人民法院	Intermediate People's court	IPC
春秋决狱	judging cases by *Chun Qiu* (classic Confucian works)	
法令	law and edicts	
法律效果与社会效果	legal effect and social effect	
国务院法制办公室	Legislative Affairs Office of the State Council of the PRC	LAOSC
马锡五审判方式	Ma Xiwu styled trial	
群体性事件	mass incidents	
政协委员	member of the CPPCC	
司法部	Ministry of Justice	
城管	municipal administration staff	
全国普法办公室	National Legal Publicity Office of	NLPO

	the PRC	
全国人民代表大会	National People's Congress	NPC
人民陪审员	People's Assessor	PA
人民代表大会	People's Congress	
人民陪审团	People's Jury	
中华人民共和国	People's Republic of China	PRC
信访/上访	petition	
涉诉信访	petitions concerning lawsuits	
政法委	political and legal committee of the CPC	PLC
法院院长	president of the court	
基层人民法院	Primary People's court	PPC
"调解优先、调判结合"原则	principle of "giving priority to mediation and combining mediation with judgment"	
检察院	procuratorate	
中央宣传部	propaganda department of the CCCPC	
党委宣传部	Propaganda Department of the CPC Committee	
罢黜百家，独尊儒术	proscribing all non-Confucian schools of thought and supporting Confucianism as the only orthodox state ideology	
国家公职人员	public officers	
公安部	Public Security Ministry	PSM
公判大会	public sentencing rallies	
劳动教养	re-education through labour	
劳教所	re-education through labour camp	
人民法院审判卷宗正卷	regular file of a case	

礼	ritual	
法治	rule of law, or rule by law	
人治	rule of man	
全国人民代表大会常务委员会	Standing Committee of the NPC	
国家广播电影电视总局	State Administration of Radio, Film, and Television	SARFT
国务院	State Council	
严打(严厉打击刑事犯罪活动)	strike-hard (*yanda*)	
人民法院审判卷宗副卷	subsidiary file of a case	
舆论监督	supervision by public opinion	
个案监督	supervision over individual cases	
最高人民法院	Supreme People's Court	SPC
案件请示制度	system of instructions of individual cases upon requests	
法院院长、庭长审批案件的制度	system where the president of the court and the chief justice of the tribunal to examine and endorse cases	
有治人，无治法	there could be some people who can keep society decent and in order while there is no law can achieve this	
潜规则	unwritten rules	

GLOSSARY TWO

CHINESE JOURNALS, NEWSPAPERS, MAGAZINES AND PRESS IN SIMPLIFIED CHINESE AND ENGLISH TRANSLATIONS IN THIS THESIS

1. Chinese journals

《学术界》	Academics
《政治学研究》	CASS (Chinese Academy of Social Sciences) Journal of Political Science
《中国法律：中英文版》	China Law
《中国法学》	China Legal Science
《中国审判》	China Trial
《中国刑事法杂志》	Chinese Criminal Science
《法学研究》	Chinese Journal of Law
《当代法学》	Contemporary Law Review
《民主与法制》	Democracy and Legal System
《法治论坛》	Forum of the Rule of Law
《河北法学》	Hebei Law Science
《比较法研究》	Journal of Comparative Law
《华东政法大学学报》	Journal of East China University of Political Science and Law (ECUPL Journal)
《司法》	Journal of Justice
《法律适用》	Journal of Law Application
《南京大学学报 哲学人文社科版》	Journal of Nanjing University (Philosophy, Humanities and Social Sciences

《西南民族大学学报·人文社科版》	Journal of Southwest University for Nationalities Humanities and Social Sciences
《西南政法大学学报》	Journal of Southwest University of Political Science and Law
《法学家》	Jurists Review
《法律和社会科学》	Law and Social Sciences
《法学评论》	Law Review
《法学杂志》	Law Science Magazine
《法学论坛》	Legal Forum
《法学》	Legal Science Monthly
《法制与社会》	Legal System and Society
《现代法学》	Modern Law Science
《司法业务文选》	New Laws and Regulations
《开放时代》	Open Times
《东方法学》	Oriental Law
《北大法律评论》	Peking University Law Review
《中外法学》	Peking University Law Journal
《政治与法律》	Political Science and Law
《诉讼法论丛》	Procedural Law Study Series
《党政干部参考》	Reference For the Party and Political Cadre
《法治研究》	Research on the Rule of Law
《法律科学》（西北政法大学学报）	Science of Law (Journal of Northwest University of Political Science and Law)
《山东审判》	Shandong Justice
《山东社会科学》	Shandong Social Sciences
《中国社会科学》	Social Science in China
《社会主义研究 》	Socialism Studies
《法商研究》	Studies in Law and Business

《人民司法》	The People’s Judicature
《理论与改革》	Theory and Reform
《政法论坛》	Tribune of Political Science and Law
(中国政法大学学报)	(Journal of China University of Political Science and law)
《清华法治论衡》	Tsinghua Journal of Rule of Law
《清华法学》	Tsinghua Law Review
《浙江社会科学》	Zhejiang Social Sciences

2. Chinese newspapers and magazines

《21 世纪经济报道》	21st Century Business Herald
《京华时报》	Beijing Times
《北京青年报》	Beijing Youth Daily
《中国经济时报》	China Economic Times
《中国新闻周刊》	China News Weekly
《中国青年报》	China Youth Daily
《决策》	Decision Making
《民主与法制》	Democracy and Legal System
《环球时报》	Global Times
《政府法制：法制参考》	Government Legality
《广州日报》	Guangzhou Daily
《贵州日报》	Guizhou Daily
《河南商报》	Henan Business Daily
《新闻记者》	Journalists
《法律与生活》	Law and Life
《法制日报》	Legal Daily
《法治周末》	Legal Weekly
《生活报》	Life Daily
《新闻战线》	News Front

《东方早报》	Oriental Morning Post
《人民法院报》	People’s Court Daily
《检察日报》	Procuratorial Daily
《记者观察》	Reporters' Notes
《山东商报》	Shandong Business
《上海法治报》	Shanghai Law Journal (a daily)
《四川法制报》	Sichuan Legal Newspaper
《南方都市报》	Southern Metropolis Daily
《南都周刊》	Southern Metropolis Weekly
《南方人物周刊》	Southern People Weekly
《南方周末》	Southern Weekend
《党建研究》	Studies on Party Development
《党政干部参考》	Studies on Party Development
《学习与实践》	Study and Practice
《新京报》	The Beijing News
《经济观察报》	The Economic Observer
《人民日报》	The People’s Daily
《工人日报》	Workers’ Daily
《潇湘晨报》	Xiaoxiang Morning Herald
《新华每日电讯》	Xinhua Daily Telegraph

3. Chinese press

法律出版社	Law Press China
人民出版社	People’s Publishing House
生活·读书·新知三联书店	SDX Joint Publishing Company
上海三联书店	Shanghai Joint Publishing Company (SJPC)
社会科学文献出版社	Social Sciences Academic Press (China)
中华书局	Zhonghua Book Company

中国法制出版社	China Legal Publishing House

INTRODUCTION

Research question and the original contribution of this thesis

In 1997, a policeman named Zhang Jinzhu drove a car when he was drunk and hit two men -- a boy and his father in Zhengzhou. Zhang did not stop immediately but kept driving and dragged the boy's father for about 1,500 metres. The boy died after he was taken to the hospital and the boy's father was seriously injured. This could have been one of the many drink driving cases that remain unnoticed. However, the Chinese media's intensive reporting brought this case to the public's attention and caused a stir among the public. Zhang's identity as a policeman stimulated even more public anger. It was widely perceived that the outraged public demanded the death penalty, and this perceived sentiment was captured by the court that heard the criminal case against Zhang. In the judgment of the first instance, the court wrote:

> This court holds that the defendant Zhang Jinzhu, being a policeman, drove against the traffic after drinking and has caused a person's death; in order to avoid responsibility, he kept driving and dragged another victim under his car and with no regard for his life or death, which has caused serious injury and disability to this victim, he is guilty of causing traffic accident and intentional injury, and his method is very brutal, its impact on the society is extremely grave, nothing but execution can assuage the outrage of the public.[1]

The court sentenced Zhang to death. Zhang appealed but the judgment of the trial court was affirmed on appeal and Zhang eventually was executed. This case has triggered a debate on "trial by media" or "trial by public opinion" within Chinese scholarship and raised doubts whether Zhang really deserved the death penalty in light of the law and the evidence. This was only the start of an ongoing debate. Subsequently, more and more high profile cases have been delivered to the Chinese public by the media in recent years (or they were made high profile by intense media coverage) and the dramatic information flows on the internet have exposed the public to extensive information on cases and their fellow citizens' opinions more than ever before. The intense expressed opinions from the public, e.g. postings on the internet on individual cases, have caused great concern among Chinese legal scholars. There

[1] (1997) Zhen Criminal First No. 307 ((1997)郑刑初字第 307 号).

is a worry that public opinion could have influenced judicial decision making in individual cases and thereby compromised the impartiality and independence of Chinese judges. This concern is evident in a significant volume of contributions to the research literature on the tension between public opinion and judicial impartiality in China. This thesis is inspired by this topical discussion on the tension between public opinion and judicial impartiality and independence within the Chinese scholarship. Values such as "judicial impartiality" are also prescribed by the letter of Chinese law, although variations on the substance of such legal values which rhetorically appear to be the same in different contexts, are often overlooked in Chinese research literature, which will be discussed in Chapter 2. The principal task of this thesis is therefore to critically review this discussion from a comparative perspective, especially considering the Anglo-American jurisprudence. The research question of this thesis is: how far the assumptions underlying this debate on the tension between public opinion and judicial impartiality and independence in China make sense and are sound.

The term "public opinion" is often used as a loose concept which is in need of clarification in Chinese literature. The limited explicit definitions of public opinion in the Chinese literature vary. It could refer to: 1) the majoritarian opinion, e.g. "the public's mainstream and dominant opinion on and intention towards how to deal with individual cases";[2] 2) generally any opinion "about important legal issues… expressed through various channels";[3] 3) "supervision by public opinion", which is mainly carried out by the media's reporting and commenting, which will be discussed in Chapter 5. The key word of this debate lacks consistency and clarity.

The mainstream attitude towards public opinion or "supervision by public opinion" in the Chinese scholarship is that it is a double-edged sword and could have either a positive or a negative impact on the administration of justice, i.e. supervision by public opinion is important as it relates to the right to know and freedom of expression and also can help to maintain the openness and fairness of the justice system; at the same time it can also undermine judicial impartiality if "it lacks restrictions or is inappropriately carried out" as the

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[2] Gu, 'Outspread Thinking on Xu Ting's Case' (公众判意的法理解析——对许霆案的延伸思考), *China Legal Science*, No. 4, 2008, p. 167.

[3] Chen Shusen, 'Game and Harmony: The Administration of Justice Walking through Law and the People's Wills' (博弈与和谐：穿行于法意与民意之间的司法), *Journal of Law Application*, No. 9, 2009, p. 57.

public could be irrational or misinformed.[4] A considerable number of contributions to the Chinese research literature on this issue has developed upon this premise and looks for the best balance between public opinion/freedom of speech and judicial impartiality, or they use the "term" justice (with variable definitions) instead of judicial impartiality. The tension between public opinion and judicial impartiality and independence is further theorised as a tension between freedom of expression/freedom of the media and judicial impartiality, as Zhang Zhiming argues that public opinion is only a phenomenon of freedom of expression/media and judicial independence does not stand for its own sake but for judicial impartiality.[5]

This tension is perceived to be unavoidable by a number of Chinese scholars.[6] The reasons for this tension given in the Chinese literature are from various aspects. First, the media have received a great amount of criticism. They are criticised for failing to be neutral and objective and for ignoring the diversity of public opinion, which eventually leads to a very emotional public,[7] especially as a result of the media's sensational and biased coverage on pending cases.[8] It is sometimes argued that the media also aspire to be neutral and objective but their standards of objectivity differ from the courts';[9] or that the media pursue sensation and efficiency, whose nature is in contradiction to judicial independence and impartiality.[10] Second, the public is criticised for lacking an understanding about law and the justice system and being punitive, and the majoritarian opinion is criticised for sometimes expressing "radical emotions";[11] especially the process of forming a leading opinion on the

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[4] Gu Xuesong, 'Seeking the Balance between Supervision by public opinion and Judicial Fairness' (寻求舆论监督与司法公正的平衡) (PhD Thesis, Jilin University 2007) p. 3, 9, 109; Chen Weidong, 'Media's Involvement in the Administration of Justice is a Double-edged Sword' (媒体介入司法是柄双刃剑), *China Trial*, No. 2, 2010, p. 66-67.

[5] Wang Haoli and He Haibo (ed), 'Summary of Discussion in Media and Justice Conference' ("司法与传媒"学术研讨会讨论摘要), *China Social Science*, No. 5, 1999, p. 72.

[6] Xu Yang, '"Retrial by Public Opinion": The Predicament and the Way out of Judicial Decision Making' ("舆情再审":司法决策的困境与出路), *China Legal Science*, No. 2, 2012, p. 181.

[7] Chen, 'Double-edged Sword', p. 67.

[8] He Weifang, 'Three Issues of Media and the Administration of Justice' (传媒与司法三题), *Chinese Journal of Law*, No. 6, 1998, p. 24.

[9] Yang Zhejing and Cheng Xinsheng, 'Three Issues of Freedom of Media and Judicial Fairness' (新闻自由与司法公正三题), *The People's Judicature*, No. 8, 1999, p. 30.

[10] Bian Jianlin, 'Media Scrutiny and Judicial Fairness' (媒体监督与司法公正), *Tribune of Political Science and Law (Journal of China University of Political Science and law)*, No. 6, 2000, p. 124-125.

[11] Gu, 'Outspread Thinking on Xu Ting's Case', p. 174-175.

internet is said to be very rapid and very difficult to control.[12] Third, a number of Chinese scholars criticise the influence of the traditional legal culture on Chinese judges i.e. judges consider common sense, values and ethics diffused in the society to ensure that their decisions will be acceptable to the people.[13]

Despite the criticism of public opinion's negative influences on judicial impartiality and independence, it is rare to see an explicit attitude that it is against the values of the rule of law if judges are influenced by public opinion. China's attitude towards this issue is more ambivalent and complex. On one hand, it is politically incorrect to exclude public opinion completely from the administration of justice, which is evident in speeches of the senior Chinese judiciary, e.g. the former president of the Supreme People's Court (SPC) Xiao Yang stated that judges should consider both the "legal impact" and "social impact" and apply law with "flexibility".[14] The "social impact" implies how the decision of a case is received by the society according to the context. Because of the significance of the "social impact", in a conference with judges, Xiao Yang's successor – Wang Shengjun (the former president of the SPC) asserted that when judges consider whether or not to apply the death penalty, one of the three grounds that should be taken into account is "the feelings of the society and the people".[15] This attitude is well received by the Chinese judges, e.g. some judges argue that they should consider the "social situation and public opinion" in individual cases[16], with very few expressing dissent[17]. Judge Qianfeng explained that even law is a kind of public opinion but is static, and therefore judges need to consult "the changing public opinion" for the ever-changing society, which is beneficial to fairness and the democratic values of the justice

[12] Yan Jing, 'Study on the Characteristics and Hazards of Online Public Opinion' (网络舆论的特点及隐患研究), *News Guide*, No. 1, 2008, p. 48.
[13] Chen, 'Game and Harmony', p. 59; Sun Xiaoxia and Xiong Jingbo, 'Judgement and Public Opinion: A Comparative Review on the Attitude of Chinese and American Judges towards Public Opinion' (判决与民意——兼比较考察中美法官如何对待民意), *Tribune of Political Science and Law (Journal of China University of Political Science and law)*, Vol. 23, No. 5, 2005, p. 49-51.
[14] Xiao Yang, 'Theoretical and Practical Issues of Judicial Impartiality' (关于司法公正的理论与实践问题), *Journal of Law Application*, No. 11, 2004, p. 5.
[15] 'The President of the SPC Wang Shengjun: People's Feelings Should Be One of the Bases for Death Penalty Application' (最高法院长王胜俊: 群众感觉应作为是否判死刑依据之一) (*Xinhua*, April 11th 2008) <http://news.xinhuanet.com/politics/2008-04/11/content_7956341.htm> accessed November 4th 2013.
[16] Chen Enze and Xiao Qiming, 'The Current Situation of Judges' Ability to Resolve Disputes and the Countermeasures' (当前法官纠纷化解能力的现状及对策), *Law Review*, No. 2, 2009, p. 141.
[17] Wang Faqiang, 'It is Inadvisable to Require "Taking Account of both the Legal and Social Impact of Adjudication"' (不宜要求"审判的法律效果与社会效果统一"), *Studies in Law and Business*, No. 6, 2000, p. 23-26.

system.[18] This position is captured by Chinese scholars. Sun and Xiong argue that "public opinion is a legitimate resource itself in China and judges explicitly allow it to enter into the judicial process".[19] On the other hand, Chinese scholars and judges acknowledge that public opinion might constitute great pressure on judges and compromise their independence and impartiality.[20] Upon such persuasion, they struggle to look for "the balance between supervision by public opinion and judicial independence" or the balance between public opinion and judicial impartiality,[21] and the line between judicial decision making bowing to public opinion and reasonably taking account of public opinion.[22] However, this line is not elaborated. The pain of searching for this balance comes from their contradictory attitude towards public opinion, because the Chinese scholars are concerned about public opinion's negative impact on the justice system;[23] however, at the same time they are also obsessed about "judicial democracy" in the state ideology or the symbolic democracy of the "socialist" justice system which is perceived as crucial to maintaining public confidence. For example, Hu Ming argues that judicial democracy indicates that "the administration should moderately reflect public opinion", and this moderate reflection includes the public's and the parties' involvement in the administration of justice and public scrutiny, although at the same time he also argues that "the administration of justice should maintain a moderate distance from public opinion".[24]

Generally, there are two types of research in this area with respect to European and North American justice systems. One is empirical research on what public opinion is on particular legal issues and analyses the gap between public opinion and the truth of the issue in question; in particular, criminologists have done extensive empirical research on public opinion on crime and the criminal justice system, e.g. *Changing Public Attitudes Toward the*

[18] Qian Feng, 'Achieving Judicial Fairness in the Environment of Online Public Opinion' (网络舆论环境下司法公正的实现), *The People's Judicature*, No.19, 2009, p. 12.
[19] Sun and Xiong, 'Chinese and American Judges', p. 55.
[20] Fan Yuji, 'The Balance between Supervision by public opinion and Judicial Independence' (舆论监督与司法独立的平衡), *Journal of East China University of Political Science and Law*, No. 3, 2007, p. 154-155.
[21] ibid.
[22] Chen, 'Game and Harmony', p. 60; Hu Ming, 'The Concept and Theoretical Ground of Judicial Democracy – Mainly from the Perspective of Criminal Justice ' (司法民主的概念与理论支点—以刑事司法为主视角) in Chen Guangzhong and Jiang Wei eds *Collection of Essays on Procedural Law Vol. 11* (Law Press 2006), p. 186-187.
[23] Xu Guanghua and Guo Xiaohong, 'The Influence of Public Opinion and the Media on Criminal Justice – Two Similar Cases of "Picking" Golf Balls Received Different Verdicts' (民意和媒体对刑事司法影响的考察——以两起"捡"球案同案异判为例), *Studies in Law and Business*, No. 6, 2012, p. 20-21.

Criminal Justice System by Peter D. Hart Research Associates, and *Public Opinion, Crime, and Criminal Justice* by Julian Roberts and Loretta Stalans, to name a few; the other type addresses normative issues on this topic. The empirical research projects on this topic are often policy oriented and designed to find out misconceptions of the public towards particular legal issues and give suggestions on policy making, e.g. *Youth Crime and Youth Justice: Public Opinion in England and Wales* by Mike Hough and Julian Roberts. The original contribution of this kind of research often comes from its first-hand empirical findings on what public opinion is. However, this thesis does not fall into this category and its original contribution does not draw upon first hand empirical evidence on public opinion. Rather, this thesis is normative research in a social context – it is based on the evidence provided by other empirical research on this topic and its original contribution comes from a different approach to analyzing normative issues surrounding this topic, and developing a critical review of the mainstream perspective within the Chinese scholarship and the assumptions that this perspective rests on. More specifically, this thesis will go beyond looking for the balance between public opinion/freedom of speech and judicial impartiality, to analyse what are the real problems compromising judicial impartiality and independence in China with regard to the dynamics of public opinion and the justice system. The existing Chinese research literature is unreserved in its criticism of media bias and the punitive and irrational waves of public opinion; however, it overlooks political and ideological influences on the media and public opinion and other complex influences on public opinion in a distinctive context. Another problem of this debate is that varied or inconsistent understandings of the same legal rhetoric and institutions are employed to develop discussion, which is isolated from or with awareness but also misunderstandings of the context where the particular rhetoric originates e.g. Western Europe. When Chinese scholars demonstrate their attitude towards public opinion's influence on the judges and argue for values of judicial impartiality, judicial independence, the rule of law, democratic values of the justice system etc., although they use the same words that are developed in the western literature, any possible variation of understanding and interpretation of these values might lead to their attitudes towards this issue being different in reality. Especially in policy oriented research, policy suggestions based on misinterpretations hardly can stand. This is why this thesis will take a comparative perspective to discuss these missed nuances, drawing

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[24] Hu, 'Theoretical Ground of Judicial Democracy, p. 186-187.

insights from relevant Anglo-American jurisprudence and experiences of other jurisdictions, and attempting to improve understanding and make an original contribution to this neglected area.

Outline of this thesis

This thesis attempts to present a systematic critical review of the Chinese scholars' debate on the tension between public opinion and judicial impartiality with insights from other jurisdictions. Before starting any further analysis and critical review of this issue, this thesis will provide some background information for this project in Chapter 1, such as: what kind of cases are more likely to raise the public's concern and why, the information resources, how the public would express their opinions, what are the disputes between the public and the court in individual high profile cases and what contributes to such disputes. With elementary analysis of the background information against the presumed empirical ground of the debate on the tension between public opinion and judicial impartiality, this thesis will raise the issue about how far the assumptions underlying this debate make sense and are sound, and will look for the answer in the rest of the thesis.

As this will be a critical review, this thesis will set up the ground of its critique in Chapter 2, inspired by the Anglo-American jurisprudence on one of the fundamental terms involved in this debate – "judicial impartiality" in the context of the influence of public opinion. More specifically, it will discuss the disparity of the implications of the same legal rhetoric in different contexts and the different approaches adopted in several jurisdictions where the tension between public opinion and judicial impartiality is perceived to exist.

This thesis will then develop its critical review in Chapter 3 through analysis of the problems of judicial independence in China, which is very likely to be responsible for the problems of judicial impartiality. As one of the presumptions of the debate is that public opinion is a major concern to judicial impartiality and independence, Chapter 3 will analyse whether the pressure of public opinion is the major threat to judicial independence, and will also discuss the dynamics of how public opinion could possible influence individual cases in the systematic context of China. As the decision makers of individual cases may also include lay assessors and pilot people's jurors in China's justice system, which remain as an important symbol of democracy and legitimacy of this socialist justice system and an institution of "properly" introducing public opinion into the administration of justice,

Chapter 3 will also analyse issues of this institution such as their representativeness, independence and impartiality with regard to their connection to public opinion in law and the state ideology.

As a widely shared view on the tension between public opinion and judicial impartiality is that the public is misinformed and lacks understanding of law and the justice system, this thesis will discuss the two major information resources of legal issues and legal cases – information accessible to the public from the justice system in Chapter 4 and from the media and the internet in Chapter 5. Public opinion is perceived to be a kind of illegitimate influence on judges; however, public opinion itself might also be subject to various influences and could possibly be moulded. This thesis will discuss the problems of the openness of the Chinese justice system and its impact on public opinion in light of the western thinking and experience of the principle of open justice, and also discuss how this would affect public confidence which is another key concept relevant to this critical review in Chapter 4. Another reason for discussing the openness of the Chinese justice system in light of the principle of open justice is that public scrutiny is perceived to be necessary to keep the justice system open and fair.[25] In Chapter 5, this thesis will focus on the limited independence and freedom of the Chinese media and its impact on public opinion, and also another key concept involved in China's debate on public opinion and judicial impartiality – "supervision by public opinion" which is mainly carried out by the media.

As public opinion is regarded as indispensable for a legitimate socialist justice system, evident by the ideological significance of the institutions of public participation such as the People's Assessors' System and the pilot People's Jury and its strong connection to democratic values in the state ideology, this thesis will discuss democratic values and its relation with public participation and public opinion in other jurisdictions, especially in common law jurisdictions and Japan which shares various cultural similarities with China in Chapter 6. The aim is to give a further critical review of the normative ground of China's obsession about the "unavoidable tension" between public opinion and judicial impartiality.

[25] Gu, 'Seeking the Balance', p. 23 - 27.

CHAPTER ONE

BACKGROUND OF THE DEBATE ON PUBLIC OPINION AND JUDICIAL IMPARTIALITY IN MAINLAND CHINA: MORE THAN A JURISPRUDENTIAL ISSUE

> Blocking the people's mouth is even more serious than blocking rivers; if rivers are obstructed and burst their banks, the flood will hurt the people. Thus it is with suppressing the people's criticism. Therefore, the person harnessing a river should excavate the water way to let the river flow smoothly; the ruler should also enlighten the people and let them speak out freely.
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> -- *Guo Yu*[26]

Introduction

China is often criticised as lacking a tradition of the rule of law and the Chinese public are criticised as lacking in legal awareness by Chinese scholars. In order to enhance legal awareness, China has put great effort into the campaign of disseminating knowledge of law and the justice system. The rising caseload and greater attention to legal events and cases might be a result of such effort. Public trial is also declared as a way of legal education to the public although trials are not always accessible to the public (e.g. politically sensitive cases) or observed by the public (e.g. routine cases). The media has been producing extensive coverage about legal issues and cases. A wide range of courtroom dramas and programmes about law is also available on TV and some of them

[26] The book is one of the earliest history books in China and records the history from BC 990 to BC 453. *Any quotation or reference of materials originally in Chinese, is translated by the author of this thesis unless otherwise specified.*

are very well received. The large number of law schools and the massive enrolment[27] has also contributed to the dissemination of legal knowledge. The public are exposed to a large amount of information about law in their daily life, and law and legal cases become a well discussed topic. In recent years, a number of cases, especially which reflect significant social problems of public concern, caused a stir among the public. Development of the internet facilitates increasing postings and comments on high profile cases, and provides a forum of public discussion where the public are exposed to larger quantity of opinions from their fellow citizens.

The value of judicial impartiality is also recognized by the letter of Chinese law, which will be developed in Chapter 2. Under such circumstances, the perceived tension between public opinion and impartiality of the judiciary has become a densely researched area, evident from a significant amount of research literature that has been published. It also becomes a concern of other relevant professions, including judges and journalists, evident from speeches of members of senior Chinese judiciary and articles by journalists. Because of the dramatic development of the internet in mainland China, online public opinion is becoming the most significant type of public opinion. Much of the research literature concentrates on jurisprudential discussion of judicial impartiality/judicial independence and public opinion/ "supervision by public opinion", and the role of the media, e.g. the relationship between media scrutiny/ freedom of media and independence of the judiciary. "Supervision by public opinion" is a frequently used term in research literature, which suggests that public opinion is perceived to be a type, and in fact an important type, of supervision over justice, which will be discussed in more depth in Chapter 5. This term suggests that the administration of justice should not be entirely isolated from public opinion, by the reason that multiple – supervision (scrutiny) is necessary to ensure that justice will be done and will be seen to be done, which is a popular argument. The debate among Chinese scholars focuses on seeking the subtle balance between public opinion (freedom of speech) and judicial impartiality/independence. It presumes that public opinion can compromise or has compromised judicial impartiality/independence in China.

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[27] Up to November 2008, there were 634 law schools in China, 300,000 law undergraduates were in education, and the masters students who were in education were over 60,000. See Li Lin and Tian He (eds),

This chapter will provide background information on this debate for further analysis, and raise more concrete issues to be discussed in the following chapters. More specific, this chapter will discuss what types of cases are inclined to be of public concern, available information resources for the public, and the nature of disputes between the public and the judges. This chapter will then critically look into major arguments given by Chinese scholars for this phenomenon, and discuss what role the courts, the media and the public play in this respect. The preliminary conclusion given at the end of this chapter will determine where this thesis will go with its major analysis in the following chapters.

1.1 The Controversy within High Profile Cases in Mainland China: More than a Jurisprudential/Legal Issue

Before this thesis goes any further with analysis, it will establish what kinds of cases are likely to be concerned by the Chinese public. This thesis will summarize this based on media coverage, and will also consult two annual surveys. One is an annual survey of ten cases that most concerned the public, which is jointly organized by several influential state-run media including the *People's Court Daily*,[28] the *People's Net*,[29] *Xinhua.org*,[30] *ChinaCourt.org*,[31] and *CNTV.cn*,[32] which vary slightly each year. The results are generated by votes online. The other one is named as "the top ten influential litigations", which is organized by the Case Study Committee of the Chinese Law Society, *Southern Weekend*[33] and several universities since 2005. The criteria are "the typical cases which have an institutional meaning and comparatively great social impact, that is, they may possibly lead to legislative and judicial reform and the change of public policy, test the principle of the rule of law, affect the public's notion on the rule of law, and promote the

Annual Report on China's Rule of Law No. 7 (2009) (中国法治发展报告 No.7 (2009)) (Social Sciences Academic Press China 2009) p. 332.

[28] This daily is run by the Supreme People's Court (SPC) of the PRC.

[29] The official website of the *People's Daily* which is the official newspaper of the Central Committee of the Communist Party of China (CCCPC).

[30] *Xinhua.org* is the official website run by *Xinhua* News Agency which is the official news agency of the government of China.

[31] It is founded by the approval of the SPC, an important law website.

[32] It is the official website of China Central Television which is the national television of China.

[33] An influential newspaper well known for being critical and outspoken.

protection of the citizens' rights".[34] This thesis acknowledges that not every year's result is only generated from votes; therefore, it will mainly consult the results based on votes.

Most of these high profile cases are criminal cases, especially corruption and bribery cases, which suggests that corruption has been a significant public concern and is addressed by the senior Communist Party of China (CPC) leadership. A very recent example is Bo Xilai's case, which also has received extensive attention from the international media.[35] Other types of criminal cases where government officials are involved are also likely to draw public attention. They might involve abuse of power, e.g. the former chief of the Justice Bureau of Chongqing, Wen Qiang, who was found guilty of taking bribes, protecting and conniving with an organization in the nature of criminal syndicate, possessing a huge amount of property from unidentified sources and rape in 2010.[36] Another example is a case of entrapment in Shanghai, which is known as "fishing style law enforcement" in China. The basic scenario is: Zhang Jun came across a man asserting that he had a bellyache and requested a lift. Zhang agreed, however, this man was in fact co-operating with the traffic administration (known as "hooks" as they can get paid from the fines the traffic administration charge and traffic administration can get a financial benefit from fines), and Zhang received administrative sanction for illegal operations.[37] The offence is not always associated with abuse of power, but the offenders' identity as government officials attracted public attention, e.g. some local government officials prostituted girls under fourteen years old in Xishui County of Guizhou

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[34] Zhao Ling, 'Top Ten Influential Litigation of 2008' (2008 年十大影响性诉讼) (*Southern Weekend*, January 15th 2009) <http://www.infzm.com/content/22860> accessed January 14th 2009.

[35] E.g. Andreas Fulda, 'Bo Xilai's Trial is a Smoke Screen for the Benefit of China's President' (*The Guardian*, August 27th 2013) <http://www.theguardian.com/commentisfree/2013/aug/27/bo-xilai-china-trial-smokescreen-president> accessed February 21st 2014; Malcolm Moore, 'Was Bo Xilai's trial a new dawn or a Party game?' (*The Telegraph*, August 31st 2013) <http://www.telegraph.co.uk/news/worldnews/asia/china/10277999/Was-Bo-Xilais-trial-a-new-dawn-or-a-Party-game.html> accessed February 21st 2014.

[36] 'The Top Ten Typical Cases Heard by the People's Courts 2010' (2010 年度人民法院十大典型案件) (*Chinacourt.org*, January 6th 2011) <http://old.chinacourt.org/html/article/201101/06/440040.shtml> accessed February 8th 2014; 'Wen Qiang still Received Death Penalty on Appeal' (文强二审仍判死), *Southern Metropolis Daily*, May 22nd 2010, p. AA04.

[37] Zhou Kaili, 'The Food Chain behind the "Fishing Case"' ("钓鱼案"背后的食物链) (*China Youth Daily*, October 16th 2009) <http://article.cyol.com/home/zqb/content/2009-10/16/content_2889691.htm> accessed May 19th 2014.

Province.[38] This suggests that the cases related to the social problems of significant public concern are likely to attract public attention, e.g. the case of *Sanlu* Company's melamine polluted milk powder[39] which reveals the serious problem of food safety.

The particular type of background of parties in civil cases or offenders and/or victims in criminal cases could attract public attention to the case. For example, if a celebrity is involved in a case, it tends to receive great attention, e.g. the widow of a well known deceased Chinese film director sued another celebrity Song Zude for defamation,[40] and the gang rape case where the son of two well-known and high ranking military singers was one of the accused.[41] If the background of the party is associated to a social problem of great public concern, it also tends to receive attention. This is because what is behind the divided opinions on these cases is the complicated tension and conflicts between different social groups, especially when they are presented in a sensational way in media coverage, e.g. Yang Jia assaulted and killed several policemen in Shanghai. Issues involved in these cases are not only technical legal issues. In Yang Jia's case, the victims are policemen while the offender is an ordinary citizen. The tension and conflicts between the police and ordinary citizens has been a problem, which is extensively reported by the Chinese media[42] and is also implicitly acknowledged by senior leaders e.g. the Minster of Public Security – Guo Shengkun, by addressing the importance of improving the relationship between the police and the people.[43] Because of the discontent about the police accumulated from scandals of corruption, torture or the negative image of bureaucracy of the police, Yang received a great amount of sympathy from the public. Nonetheless, Yang was not saved by public opinion and was eventually executed.

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[38] 'The Top Ten Cases of 2009 in China' (2009 年度中国十大案件) (*Chinacourt.org*, December 29th 2009) <http://old.chinacourt.org/html/article/200912/28/388132.shtml> accessed February 8th 2014.
[39] ibid.
[40] 'The Top Ten Typical Cases Heard by the People's Courts 2010' (2010 年度人民法院十大典型案件) (*Chinacourt.org*, January 6th 2011) <http://old.chinacourt.org/html/article/201101/06/440040.shtml> accessed February 8th 2014.
[41] Wang Xin, 'The Son of Li Shuangjiang is under Criminal Detention as a Suspect of Gang Rape' (李双江之子涉嫌轮奸被刑拘), *Southern Metropolis Daily*, February 23rd 2013, p. AA09.
[42] For example, Chen Zhikuan, Luo Huashan, and Li Yong, 'Our Province Handled "6·28" Riot Properly according to Law' (我省依法妥善处置瓮安县"６·２８"打砸烧突发事件), *Guizhou Daily*, June 30th 2008, p. 001; 'A "Samaritan" was Handcuffed, Reflecting the Tension between the Police and the People' ("学雷锋"被拷，折射警民关系紧张) (*Youth.cn*, April 12th 2013) <http://pinglun.youth.cn/zqsp/201304/t20130412_3092306.htm> accessed on February 21st 2014.
[43] For example, 'Working on Harmonious Relationship between the Police and the People as Close as Fish and Water' (构建鱼水情深的和谐警民关系), *People's Daily*, August 19th 2013, p. 4.

The sentiment of the public expressed at Yang Jia's case is also discontent of inequality and sympathy for the weak, which is also found in many other high profile cases, e.g. the traffic accident caused by Li Qiming, the son of a police official and another traffic accident caused by Hu Bin who comes from an affluent family; the case of a waitress Deng Yujiao who stabbed a few government officials to protect herself from sexual attack;[44] and *Chengguan* (municipal administration staff) who beat a man to death in Tianmen.[45] The public expressed their concern that offenders from powerful and influential backgrounds might have privileges above the law and escape from the penalty due by law. For example, in the drag driving case in Hangzhou, some people suspected that the defendant at the trial was a stand-in for the real perpetrator – Hu Bin and they publicized the photos of Hu and his suspected stand-in and they even identified the stand-in. The court claimed that it was a rumour and the identification of the defendant is beyond any doubt.[46] It is not the only doubt of the public in this case.[47] Hu received three years' imprisonment in the first instance and it was criticised as too lenient. Similar criticism also emerged in Li Qiming's case after the judgment was announced. Li received six years' imprisonment, which is perceived to be over lenient and attributed to influence from Li's father -- a local police officer.

What this sentiment shows is a society with equality problems. Sun Liping argues that wealth is increasingly controlled by the minority because of corruption, dividing up state assets, and institutional discrimination against the disadvantaged etc. which occurred during the economic reforms in China, leading to an increasing wealth gap and an impoverished social group in the cities, which presents a "more direct and concrete" image of such problems than previously.[48] Also, as Sun Liping argues, China fails to maintain the balance between economic development and social equality, and the disadvantaged groups are neglected; many social problems e.g. the gap between the

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[44] 'Top Ten Cases of 2009 in China'.
[45] 'The Top Ten Cases of 2008 in China' (2008 年中国十大案件) (*Chinacourt.org*, January 4th 2009) <http://old.chinacourt.org/html/article/200812/30/337891.shtml> accessed February 8th 2014.
[46] Sheng Dalin, 'Hangzhou Stand-in Suspicions: Expecting More Convincing Explanations' (杭州"替身门"：期待更令人信服的解释), *Procuratorial Daily*, July 29th 2009, p. 006.
[47] Lv Minghe, '70 Miles per Hour? A Lie?' (70 码？"欺实马"？) (*Southern Weekend*, May 14th 2009) <http://www.infzm.com/content/28397> accessed April 26th 2014.
[48] Sun Liping, *Cleavage: Chinese Society since 1990s* (断裂：20 世纪 90 年代以来的中国社会) (Social Sciences Academic Press/SSAP 2003) p. 63-73.

wealthy and the impoverished have not been improved.[49] This might explain the public's sentiment against the wealthy and powerful and sympathy with the disadvantaged, triggered by the cases previously discussed. Moreover, Sun argues that they lack the ability to use legal or other institutional remedy and might appeal to "irregular" or illegal methods and become a risk to social stability.[50] Especially when it is associated to the concrete social problems of public concern, and presented in the media with sensation, the case would receive a great amount of public attention. Wang Binyu's case is an example. Migrant workers' wages being in arrears is a problem reported frequently by the Chinese media and is well known by the public.[51] Wang, a migrant worker from the rural area, killed four people and severely injured one who was his foreman and family members because of the dispute caused by delayed wage payment, and he was prosecuted and received the death penalty.[52] The migrant workers from the rural areas constitute a significant disadvantaged group because of exploitation, adverse working environment and frequent arrear of wages.[53] The public showed great sympathy for Wang, although it is attributed to media coverage focusing on Wang's experience of arrears of wages rather than the crime.[54] According to news reports that many staff of the local court and the local procuratorate were concerned that "many people are commenting based on the 'fact' set out in media coverage rather than the fact held by the court".[55] A judge told a journalist that "the court cannot understand why the application of the death penalty has caused such great controversy and they feel pressure, and therefore they are very wary of interviews as they are concerned about the potential negative impact on the adjudicative work".[56]

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[49] Sun Liping, *Imbalance: The Logic of A Fractured Society* (The Author's Translation) (失衡：断裂社会的运作逻辑) (Social Sciences Academic Press/SSAP 2004) p. 109; 110.
[50] Sun Liping, *Cleavage*, p. 73.
[51] For example, Gaozhu, 'Over RMB 30 Million's Wage of 800 Migrant Workers from Luzhou were in Arrears' (泸州 800 农民工包头被欠工资 3000 万元), *Workers' Daily*, August 29th 2013, p. 001; Li Yanan, 'Why are They on the Most Humble Journey of Asking for Salary' (他们为何走上最屈辱讨薪之路), *Xinhua Daily Telegraph*, January 6th 2014, p. 004.
[52] (2005) Shizuishan Criminal First Instance No. 16 ((2005)石刑初字第 16 号).
[53] Sun Liping, *Cleavage*, p. 66.
[54] 'Beware of the Bias of Public Opinion on Wang Binyu's Case' (提防王斌余案的舆论偏差), *China News Weekly*, No. 35, 2005, p. 8; 'Why a Migrant Worker becomes a Murderer' (一农民工为何成了杀人犯) (*Beijing Youth Daily*, September 5th 2005) <http://bjyouth.ynet.com/3.1/0509/05/1123859.html> accessed April 26th 2014.
[55] Xue Zhengjian, 'The Fact in News? Or Legal Fact? Restoring the Truth of Wang Binyu's Case' (要新闻事实？还是要法律事实？王斌余案真相还原), *Procuratorial Daily*, September 21st 2005, p. 005.
[56] ibid.

At first glance, the disputes within high profile cases could be categorized as: (a) the public distrusts that the court can find out the truth or the facts held by the court; (b) the public perceive that the conviction or/and the punishment is too harsh or too lenient in criminal cases or the public expressed their opinions on sentencing when a case is still pending; (c) the public distrusts the fairness of the procedure or/and the decision. The corresponding examples will be given below. However, the controversy might be more than divided opinions of a particular case.

A typical case of controversy in factual issues is a case about the authenticity of a tiger photo. Zhou Zhenglong, a farmer in Shaanxi province claimed he had found a South China Tiger and had taken photos of the tiger in October of 2007. The forestry department of Shaanxi Province declared that the South China Tiger had been found. The photos of the tiger were published and aroused doubts about their authenticity. For example, a lot of people suspected that it was the photograph of a tiger New Year Picture. At first, the forestry department of Shaanxi Province declared that it would not vouch for the authenticity of the picture. Nonetheless, many experts and professional organizations published their own tests and results to prove that the tiger picture was fake. The national forestry department ordered the forestry department of Shaanxi Province to authenticate the tiger picture. In June of 2008, the government of Shaanxi declared that the tiger photo was fake at a press conference. Zhou was arrested and then accused of fraud and illegal possession of ammunition and was found to be guilty. On appeal, the original judgment was affirmed, but the court of appeal gave three years' probation.[57] In February of 2010, Zhou hired five lawyers and presented a petition to the court of appeal of his case to quash the conviction, the Intermediate People's Court (IPC) of Ankang City,[58] which is in accordance with law.[59] In June of 2010, Zhou's wife presented a petition to the SPC relying on three reasons: first, the evidence of the tiger New Year Picture was stealthily substituted; secondly, Zhou was tortured; third, the court did not send the tiger photo and the New Year Picture to an authoritative organization for identification.[60] What is behind

[57] (2008) Angkang Intermediate Criminal Final No. 91 (（2008）安中刑终字第 91 号).
[58] Shu Shengxiang, 'Zhou Zhenglong Present a Petition: the Tiger Picture is a Small Matter while the Rule of Law is a Major Matter' (周正龙申诉：虎照事小，法治事大), *Procuratorial Daily*, February 8th 2010, p. 4.
[59] Article 203, Chapter 5, Part 3 of the Criminal Procedure Law of the People's Republic of China (PRC).
[60] Wang Lina, 'Today Zhou Zhenglong's Wife is Presenting a Written Petition to the SPC' (周正龙妻今向最高法递申诉状), *Beijing Times*, June 10th 2010, p. 010.

the controversy is the undermined public confidence towards the credibility of the government and the court, which might cause controversy in other cases of the like.

A typical case of public opinion on the over-harsh punishment in criminal cases is Xu Ting's case. The basic scenario is: Xu Ting, worked in Guangzhou and found that there was an error of a bank's ATM so that each withdrawal of RMB 1,000 only resulted in a RMB 1 debit to his account. Xu continued to withdraw cash from the ATM and told his friend about the error. Xu has withdrawn RMB 175,000 in total and his friend has withdrawn RMB 18,000. They both absconded with the money. However, Xu's friend went to the police office to confess and returned the money while Xu was caught by the police and could not return the money. In the first instance, Xu was found guilty of theft by the IPC of Guangzhou. According to the criminal code of the PRC, if "stealing from a banking institution and the amount involved is especially huge", life imprisonment or the death penalty must be applied with confiscation of property.[61] And according to a judicial interpretation on theft, the illegal income is "especially huge".[62] The court held Xu's offence was "stealing from a banking institution" and therefore the sentence should be life imprisonment, confiscation of property and deprival of political rights for life. This case was delivered by the media all over the country to the public and Xu received great sympathy from the public. Gu Peidong attributed it to the people's sympathy for the weak, the accumulated discontent for the bank's arrogant attitude, the understanding of the inherent frailty of human nature, and this case exceeded the people's imagination of stealing from a financial institution.[63] What also caused great discontent from the public is that some corrupt government officials took far more than Xu had stolen from the ATM but received more lenient sentences.[64] The Higher People's Court (HPC) of Guangdong Province sent this case back to the trial court for retrial. Before the retrial was concluded,

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[61] Article 264, Chapter 5, Part 2 of the Criminal Law of the PRC.

[62] SPC, *The Interpretations of Several Issues of Applying Law to Theft Cases by the SPC* (最高人民法院关于审理盗窃案件具体应用法律若干问题的解释), Document Number Judicial Interpretation [1998] No. 4 (法释［１９９８］4 号), abolished by SPC and SPP, T*he Interpretations on Several Issues of Applying Law when Dealing with Theft Cases by the SPC and SPP*' (最高人民法院 最高人民检察院关于办理盗窃刑事案件适用法律若干问题的解释), Document Number Judicial Interpretation [2013] No. 8 (法释[2013]8 号), in effect from April 4th 2013. The standard of "especially huge" is changed into RMB 300,000-500,000 and above from RMB 30,000-100,000.

[63] Gu Peidong, 'Jurisprudential Analysis of People's Wills – Outspread Thinking on Xu Ting's Case' (公众判意的法理解析——对许霆案的延伸思考), *China Legal Science*, No. 4, 2008, p. 171-173.

a vice-president of the SPC had also indicated that the sentence was too harsh in an interview, and he also disclosed that the judgment of the retrial would be announced no sooner than the end of the month.[65] Not surprisingly, the sentence was reduced to five years' imprisonment, although Xu was still found to be guilty of theft. Xu appealed but this was dismissed.

An example where the punishment is perceived to be unduly lenient is Liu Yong's case. On April 17th of 2003, Liu Yong was found guilty of forming and leading an organization similar to the mafia, intentional injury etc. (seven convictions) and was sentenced to death. On appeal, considering the possibility of that Liu was tortured, and "the fact, nature, circumstances, the extent of harm to society and the specific circumstances of this case",[66] the court of appeal issued a suspended death penalty. At the same time, another leader of the mafia, whose status was lower than Liu, was still sentenced to death with immediate enforcement and was executed. The death penalty with immediate effect means the convicted defendant will be executed after the death penalty is authorized. The death penalty with two years suspension is another way of implementing the sentence rather than a different conviction; according to the criminal code of PRC, if the condemned does not commit an intentional crime in the period of suspension during his/her stay in a prison, his sentence will be amended to life imprisonment.[67] The judgment of appeal caused a stir among the public and triggered suspicions of financial favour and interference from government officials who may be protecting Liu's mafia.[68] This suggests the undermined public confidence in the justice system of China. The SPC retried this case and amended the sentence to the death penalty with immediate execution.[69] In mainland China, any judgment made by the SPC is final and the sentencing does not have to be conferred through "review of death penalty" as it was sentenced by the SPC itself. Liu Yong was executed on the same day when the judgment

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[64] Chang Ping, 'Why Xu Ting became a media darling?' (许霆为何成为媒体宠儿), *Southern Weekend*, August 5th 2010, p. F30.

[65] Xia Lingqun, 'The Sentencing of the First Instance of Xu Ting's Case was Obviously too Harsh' (许霆案一审量刑明显过重), *Beijing Times*, March 11th 2008, p. A10.

[66] The reason for changing the sentence, given by the court of appeal, is cited by the SPC in its judgment of retrial, and the number of the retrial judgment is (2003) Criminal Review No. 5(（2003）刑提字第 5 号).

[67] Article 50, Section 5, Chapter 3, Part 1 of the Criminal Law of the PRC.

[68] Liu Xiaobiao and Shen yang, 'The Truth of the Amended Sentencing of Liu Yong -- the Head of the Mafia in Liaoning' (辽宁黑社会老大刘涌死刑改判死缓事件真相) (*Sina,* August 27th 2003) <http://news.sina.com.cn/c/2003-08-27/12311627513.shtml> accessed March 30th 2014.

was announced. However, a crisis of public confidence in the criminal justice system of China is unlikely to be solved by the execution of Liu, which will be developed in chapter 4.

The cases analysed above suggest that the disputes between public opinion and the court arise from the failure of the court to *convince* the public that justice will be done or has been done, although it does not necessarily conclude that justice will not be done or has not been done. The controversy is the outbreak of the public's concern of various social problems and problems of unfairness in the justice system over certain legal cases, driven by distrust of the government and the justice system. In the next section, this thesis will further discuss the arguments given by Chinese scholars for the reasons of the controversy.

1.2 Why Controversial?

1.2.1 The Perceived Problems of the Public – What Counts as "Public Opinion"?

It is a widely shared perception that the public are lacking in knowledge about and belief in the law, e.g. a report bemoans the "laggard legal consciousness" which causes difficulty for the public to understand the procedure and decisions of the court and even leads to misunderstandings.[70] However, none of the literature elaborates what counts as legitimate understanding or legal consciousness. Apparently, the general public do not have to understand the law as well as the legal profession. Even within the legal profession, divided opinions among lawyers, judges and scholars on individual controversial cases are quite common. Another common criticism in Chinese research literature is that public opinion could be very emotional or even radical.[71] However, the entire public are not always merely emotional, e.g. in the case of the forged tiger picture, some members of the public gave a detailed comparison of pictures of animals and fake

[69] (2003) Criminal Review No. 5 (（2003）刑提字第 5 号).
[70] Research Team of the HPC of Sichuan Province, 'The Survey Report of Public Confidence in the People's Courts' (人民法院司法公信力调查报告), *Journal of Law Application*, No. 4, 2007, p. 40; Gu, 'Jurisprudential Analysis of People's Wills', p. 174.
[71] Gu, 'Jurisprudential Analysis of People's Wills', p. 175.

ones by elaborating technical details to support their opinion,[72] regardless whether there were any technical errors. In Xu Ting's case, some people gave their analysis on some legal issues through the legal knowledge they had, e.g. what is "stealing from a financial institution" and whether Xu Ting's conduct objectively constituted such an offence, how to identify the *mens rea* in this case etc.

Moreover, to analyse or review any analysis on public opinion, it is crucial to define: what is public opinion? Public opinion literally suggests what the entire public are thinking about, which is distinguished from what is perceived to be the "public opinion" by judges. Some Chinese scholars perceive that there is overwhelming majoritarian opinion in high profile cases, e.g. retrial of Liu Yong's case and the case of a traffic accident by a man driving a BMW in Haerbin under the pressure of public opinion.[73] However, to discover what the entire public thinks about could be a methodological pain, especially public opinion in a massive country of great diversity and in transformation such as China, where some people might stay silent and some voices cannot be heard because of censorship, which will be developed in Chapter 5. What are behind divided opinions are divided values and interests within the contemporary Chinese society. For example, Sun Liping argues that pollution has become a public concern in developed cities like Beijing, while Sun finds that in an impoverished and severely polluted area in Shanxi Province, economic development and poverty elimination is perceived to be more important than pollution control.[74] Under such circumstances, if a judge hears a case where a local factory illegally discharges pollutants, and the fine provided by law could bankrupt the factory and lead to unemployment, what side the local public opinion will take depends on their values and interests, which might vary from area to area.

Public opinion might also change within the same case depending on the media's attitude. A typical example is the case where six police officers fatally assaulted a university student in Haerbin, which triggered outrage at the police and sympathy with the victim. After a video was made available on the internet, which showed that the victim had provoked the policemen and implied that the victim bore a great deal of fault and responsibility, a rumour emerged that the victim was a drug addict from an affluent family,

[72] E.g. Li Lichun *et al*., 'Video-metric Research on the Photos of South China Tiger' ("华南虎"照片的摄像测量研究), *Science and Technology Review*, No. 1, 2008.
[73] Sun Liping, *Imbalance*, p. 174.

or had connections with a dignitary in government, and media coverage also changed its tone.[75] However, it was subsequently found that the video was edited which put the authenticity and objectivity of the video in doubt, and the victim's father also stated that "someone made up the rumour about the dignitary and wealthy businessman, so that the society will dislike us, and it is someone that led the public opinion to be disadvantageous for us".[76] However, the truth then was obscured by a cloud of suspicion before the public. An online commentary article asserts that there are two types of popular hostility on the internet, "one is the hostility to oppression of civil rights caused by the excessive exercise of state power… the other one is the hostility to the extreme rich caused by the rapid and highly concentration of wealth and the great disparity between the rich and the poor", and in this case, the public have no idea what to choose between these two types of hostility.[77] This raises the issue of accessibility and reliability of information resources.

The major information resources for the public are: official information resources such as the transcript of the trial and the judgment if there is a trial; media (including both paper media and online media) reporting; and grapevine news on social media and the internet. These information resources are not free from problems. Chinese judges conventionally do not give detailed reasoning for the decision even in high profile cases, which will be developed in Chapter 4. However, the court sometimes gives explanations to the journalists in interviews or at press conferences, or publicize such explanations on media after the judgment is announced, which will be discussed in section 1.3 of this chapter. The media cannot always get access to reliable information and therefore will not be able to deliver that to the public. For example, in Li Qiming's drink driving case, many journalists were refused access to watch the trial by the reason that "the courtroom is too small and there is no gallery for public or media", and some journalists who requested to attend the trial were stalked. The Political and Legal Committee (PLC)[78] of *Baoding* and

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[74] Sun Liping, *Cleavage*, p. 13.
[75] Liu Ding, 'The Case where the Policemen in Haerbin Beat a Student to Death: Violence, Lies, and Videotape', (哈尔滨警察打死学生案：暴力、谎言和录像带) (*Southern Weekend*, October 30th 2008) <http://www.infzm.com/content/19224> accessed April 26th 2014.
[76] ibid.
[77] 'Why Public Opinion is So Billowy in the Case of "Policemen Beat a University Student to Death"' ("警察打死大学生"案后舆论为何如此汹涌) (*Enorth*, October 22nd 2008) <http://news.enorth.com.cn/system/2008/10/22/003733866.shtml> accessed April 26th 2014.
[78] Wei Hongqian and Gao Xin, 'The Case of the Accident Happened in Hebei University Is on Trial Today, Journalists from Many Media are Refused to Attend the Trial and are Stalked' (河北大学车祸案今日开庭

the Propaganda Department (PD) of the CPC Committee of *Baoding* came to a secret agreement with five media: each one of these five media was permitted to send a journalist to attend the trial for the appearance of a public trial, on condition that they would adopt the news release provided by these two authorities.[79] This also raises the relevant issue of the openness of the justice system in China, which will be discussed in Chapter 4. Apart from restrictions to official information resources, Chinese media is subject to censorship, which will be developed in Chapter 5. Therefore, it is questionable whether the media can inform the public or represent public opinion.

Under such circumstances, the internet becomes the alternative information resources for the public and also a space to express their opinions. According to a report, up to June 30th of 2010, 420 million people were using the internet in China; as a result, some event will often cause a stir among the public shortly after details are published on the internet and become a public topic.[80] However, despite that no one has to convince an editor to publish their opinions compared with paper media, postings containing "sensitive words" might be filtered and "inappropriate" articles might be deleted by the administrators of websites, e.g. *Baidu*, a popular search engine in China, sometimes cannot display all results if some contains sensitive information and will give a notice – "according to the relevant law, regulations, and policies, part of the search results are not displayed".[81] By employing censorship, the authority can decide what can be known by the public. Because of restrictions on accessibility of reliable information resources, the public could be -- as what the authority, judges and scholars criticised -- biased and irrational. Another problem of exploring public opinion according to the postings on the internet is the representativeness of the internet users, e.g. up to 2008, 68.6% of internet users in China are under 30 years old.[82]

多家媒体记者被拒旁听遭跟踪) (*People.com*, January 26th 2011) <http://media.people.com.cn/GB/40606/13816146.html> accessed April 26th 2014.

[79] ibid.

[80] Online Public Opinion Monitoring Office of People's Net, 'Analysis Report on Online Public Opinion of China of 2010' (2010 中国互联网舆情分析报告) (*People.com*, December 15th 2010) <http://media.people.com.cn/GB/40606/13489601.html> accessed April 26th 2014.

[81] The original expression in Chinese is: 根据相关法律法规和政策，部分搜索结果未予显示。

[82] Zhu Huaxin, Shan Xuegang and Hu Jiangchun, 'A Report on Online Public Opinion of China 2008', (2008 中国互联网舆情分析报告) (*China.com*, January 13th 2009) <http://www.china.com.cn/aboutchina/zhuanti/09zgshxs/content_17100922.htm> accessed April 26th 2014.

The Chinese public might not be as powerful as it appears to be. Apart from being perceived as a source of influence on the justice system, public opinion itself is also subject to influence. As Sun Liping argues, public policy making and legislation process is influenced gradually by the advantaged groups rather than the disadvantaged groups, e.g. "because these social forces have financial advantage, they can take advantage of public opinion tools and academic activities by providing financial support and make media and scholars speak for them",[83] and influence public opinion.[84] At this point, another significant issue arises: what influences public opinion is subject to, or how public opinion is politically and ideologically constructed in China, which will be discussed in Chapter 4 and 5 when discussing information resources and censorship.

1.2.2 The Perceived Problems of the Justice System and the Judiciary

In 2005, the HPC of Sichuan Province did a survey on public confidence in the administration of justice and found that the current situation is not to the public's satisfaction.[85] More than 70% of respondents perceive that judges should have both professional knowledge and experience, while only a minority of judges have a legal education background.[86] Before the 1990s, the requirements of eligibility for being a judge were less developed than nowadays, e.g. many judges did not have a law degree or had not passed the national judicial examination before they were appointed, and some of them never received any training when holding their offices.[87] It is supported by research and statistics published by some courts that the general situation is still "unsatisfactory", although the quality of judges has been improved these years.[88] Up to 2001, no more than

[83] Sun Liping, *Imbalance*, p. 110-111.
[84] Sun Liping, *Gaming*, p. 274.
[85] Research Team of the HPC of Sichuan Province, 'Public Confidence', p. 38-41.
[86] ibid, p. 38.
[87] PPC of Zhifu District of Yantai City, 'A Survey about the Workload of the Judges in Primary Courts' (关于基层法官工作负荷情况的调查), *Shandong Justice*, No. 4, 2005, p. 52; Tian Yu, 'The Professionalization of Judges: the New Images of Chinese Judges' (法官职业化：中国法官新形象) (*Chinacourt*, February 19th 2003) <http://www.chinacourt.org/public/detail.php?id=37805> accessed April 26th 2014.
[88] PPC of Zhifu District of Yantai City, 'Workload of the Judges in Primary Courts'. In this court, up to when the report was published, only 23.68% judges have a bachelor degree in law.

20% of judges had a university degree.[89] Most respondents perceived that a judge's conscience and knowledge is most important for their impartiality; however, the report concludes that a small number of judges' problems of professional ethics have undermined public confidence in the entire judiciary.[90] This perception is also shared by some Chinese scholars, e.g. Su Li argues that the popular image of a good judge is "an understanding, considerate, and thoughtful woman" and "a noble-minded person of integrity", based on his analysis of the judges who were widely publicized and praised by the authority in the previous thirty years; however, nowadays the justice system and judges are lacking moral and ethical authority which is the essence of public confidence.[91] Perhaps, this is why only 33.71% of respondents perceive judges' reasoning as convincing; at the same time, even nearly one third of lawyers and other members of legal profession perceive that judgments can hardly convince the general public.[92] This report attributes the distrust to the unfairness of a small number of judgments and the procedure. The report also finds that Chinese judges cannot exclude prejudice and preconceptions and nearly a half of judges meet the lawyers at work which might invite suspicions of procedural unfairness e.g. bribery.[93]

Vagueness in legislation leaves Chinese judges a great discretion, e.g. the frequently used words such as "relatively large", "huge", "especially huge", "serious", "very serious" etc., if not further clarified by judicial interpretation. With regard to sentencing, discretion is widely provided for by Chinese criminal law to judges and the span between the maximum and the minimum punishment is large, e.g. the provision about murder: "whoever intentionally commits homicide shall be sentenced to death, life imprisonment or fixed-term imprisonment of not less than 10 years; if the circumstances are relatively minor, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years." [94] Another example is a provision in the criminal code:

> In cases where the circumstances of a crime do not warrant a mitigated punishment under the provisions of this Law; however, in

[89] Zhang Jun, 'The Criterion of Judicial Fairness and the Rational Recognition and Pursuit of It' (司法公正的标准与理性的认识、追求), *The People's Judicature*, No. 3, 2001, p. 11.
[90] Research Team of the HPC of Sichuan Province, 'Public Confidence', p. 38.
[91] Su Li, 'The Image of Chinese Judges: Thinking on the Working Method of Chen Yanping' (中国法官的形象塑造——关于"陈燕萍工作法"的思考), *Tsinghua Law Review*, No. 3, 2010, p. 82, 77.
[92] Research Team of the HPC of Sichuan Province, 'Public Confidence', p. 39.
[93] ibid.
[94] Article 232, Chapter 4, Part 2 of the Criminal Law of the PRC.

> the light of the special circumstances of the case, and upon verification and approval of the SPC, the criminal may still be sentenced to a punishment less than the prescribed punishment.[95]

However, "the special circumstances" are not specified by law and are subject to the judges' discretion.

The Reasoning of the judgment can affect how persuasive it is. Conventionally, most judgments consist of a summary of both parties' arguments, the facts that the court finds or holds, the legal provisions which should be applied and the decision, without detailed reasoning as to why such a decision is reached. Instead, in some high profile cases, the court's publicity department will hold a press conference or accept interviews to explain their decisions or react to the doubts.

As established in the first part of this chapter, the public is concerned about unfairness at the procedure of the administration of justice and the result of the decisions. A widely acknowledged problem is that the judiciary and the courts are not independent. If the court cannot make a decision free from the influence of the government, its decision might be against the interest of justice and trigger public outrage. An example is *Sanlu*'s poisoned milk powder which caused serious kidney harm and even deaths of many infants. The parents of the victims went to the court to sue the company, however, the court refused to accept the cases for the reason that they were still "waiting for the guide of compensation from the government".[96] At last, the local court accepted to deal with these cases; nonetheless, it is hard for the public to trust that the judgment would be in accordance with law rather than the interests of the local government. Not only do the courts lack institutional independence, individual judges are not independent either. A judge may have to adopt the guidance from a leader in his or her court, e.g. the president of the court, or the adjudication committee of this court, or another court of higher status. A lack of independence of the judiciary is perceived to be an important reason for miscarriages of justice and therefore become a source of disputes between the public and judiciary, because judicial independence is perceived to be "an institutional guarantee of

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95 Paragraph 2, Article 63, Section 1, Chapter 4, Part 1 of the Criminal Law of the PRC.

96 Chen Weihua, 'A Member of CPPCC Questioned Aggressively: Why Do Not File Cases when People Claimed Compensation to *Sanlu* Company' (委员逼问:向三鹿索赔为何不立案), *Southern Metropolis Daily*, March 12th 2009, p. A12.

judicial fairness”,[97] judges cannot be neutral if they are not independent.[98] Li Jing argued that two institutional obstacles of judicial independence and fairness are the localization of judicial power and administrative character of the judicial system. The former indicates that the personnel are also managed by the local government and party organizations, and funding comes from the local finance. The latter indicates that a judge is also a civil servant, and to ensure the correctness of every judgment, a judgment will be passed on to different levels for approval and checked on by the leaders. [99] The problems of independence of Chinese judiciary will be specially discussed in Chapter 3.

1.2.3 The Perceived Problems of the Media

Whether a case receives intense public attention is also related to the way that it is presented in the media. The role of the media, therefore, becomes relevant to the central issue of this thesis. Sensational stories are more likely to catch the headlines, e.g. *Huang Jing*’s case, where a female teacher was found dead while naked. The reports frequently used titles consisting of “female teacher” and “nude death”,[100] and some reports even contained Huang Jing’s photos while living to show Huang Jing was young and beautiful.[101] As He Haibo argued, “sex, violence or injustice -- the elements of Hollywood movies is all concentrated on Huang Jing’s case”.[102] Because of commercialization, Chinese media are more motivated to produce popular and attractive coverage for market share. A popular criticism is that the media is not impartial and objective.[103] More specific: “some journalists hype cases before they know the truth and result in improper

[97] Dong Maoyun, ‘Judicial Independence: the Important Institutional Guarantee of Judicial Fairness’ (司法独立: 司法公正的重要制度保证), *China Legal Science*, No. 1, 2003, p. 10.
[98] Yao Li, ‘An Analysis on the Elements of Judicial Fairness’ (司法公正要素分析), *Chinese Journal of Law*, No. 5, 2003, p. 20.
[99] Li Jing, ‘An Analysis of Obstacles of Judicial Fairness and the Renovation’ (司法公正的障碍性因素分析及其整治), *Socialism Studies*, No. 2, 2002, p. 68.
[100] Deng Yan and Xia Xiaomin, ‘The Decision of the Case Where the Female Teacher from Xiangtan Died in Nude has been Announced’ (湘潭女教师裸死案宣判), *People’s Court Daily*, July 11th 2006, p. 004.
[101] ‘The Trial of the Case where the Female Teacher Huang Jing from Hu’nan Died in Nude Started’ (湖南女教师黄静裸死案开审) (*Xinhua*, December 7th 2004) <http://news.xinhuanet.com/legal/2004-12/07/content_2328583.htm> accessed April 26th 2014.
[102] He Haibo, *Substantial Rule of Law: Seeking Legality of the Judgments of Administrative Litigations* (实质法治：寻求行政判决的合法性) (Law Press China 2009) p. 391.
[103] Jing Hanchao, ‘The Conflict and Balance between Media Scrutiny and Judicial Independence’ (传媒监督与司法独立的冲突与契合), *Modern Law Science*, No. 1, 2002, p. 96.

public opinion";[104] use some sensational and tendentious words or description in coverage and create pressure on the court;[105] the media do not reflect different voices from the public[106] etc.

However, commercialization is not entirely responsible for the media's bias. The predomination of positive propaganda and coverage is a requirement and principle of Chinese media. The reason is that if the negative coverage is too intense, it will "mislead" the public that the ingrained problems are hard to resolve and affect the public's confidence in the future.[107] The Chinese media is still perceived to be the mouthpiece of the government and the CPC and is subject to various restrictions, despite that the freedom of speech and the press is established in China's constitution.[108] There are boundaries which the media is required not to step over at critical reporting. A senior journalist explained that the official identity has provided Chinese media the ability to solve some problems for the people, but it also set some certain limits or rules for their reporting, e.g. when considering to report or not and how to report, the media have to consider "what level's authority is involved and to what level they can criticise", "the problems of images and guidance", and how sensitive the case is etc.[109] Therefore, as Liebman argued, "the Chinese media are best understood not as increasingly independent, but as commercialized government mouthpieces".[110]

In principle, Chinese media have access to trials, provided by *Several Regulations on Strictly Enforcing the Principle of Open Trials by the SPC* in 1999; and *Six Provisions on Open Justice* in 2009. However, a tension between Chinese media and Chinese courts is visible, evident by a judicial interpretation issued by the SPC -- *Some provisions on the people's courts to accept supervision from media and public opinion by the Supreme*

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[104] Wu Ting, 'The Right of Supervision by public opinion in the Context of Entrapment' (从钓鱼执法事件看舆论监督权), *Legal System and Society*, No. 7, 2010, p. 8.
[105] He Weifang, 'Three Issues of Media and the Administration of Justice' (传媒与司法三题), *Chinese Journal of Law*, No. 6, 1998, p. 24.
[106] Chen Weidong, 'Media's Involvement in the Administration of Justice is a Double-edged Sword' (媒体介入司法是柄双刃剑), *China Trial*, No. 85, 2010, p. 67.
[107] Xuan Wanming, 'Macro-control and Positive Guidance of the Negative Coverage' (负面新闻的宏观控制与正面引导) (*People.com*, January 8th 2008) <http://media.people.com.cn/GB/22114/42328/114002/6747763.html> accessed April 26th 2014.
[108] Article 35, Chapter 2 of the Constitution of the PRC.
[109] Wang Haoli and He Haibo (eds), 'Summary of Discussion in Media and Justice Conference' ("司法与传媒"学术研讨会讨论摘要), *China Social Science*, No. 5, 1999, p. 77.

Court in 2009. It is rather interesting to see the scrutinized setting rules for the scrutinizer. This is because sometimes the media can put pressure on the court for a particular decision by reporting or threatening to report.[111] The Chinese media can have influence on legal cases. As Liebman argues, if the media can successfully make a case a public topic, it will also become a concern of the political leaders and they will urge the court to deal with the case or give instructions about how to deal with the case.[112] However, the court also have chance to retaliate as they have discretion to decide who can watch the trial. [113] Sometimes, the court even sues the media for defamation. For example, in 1995, the magazine *Democracy and Legal System* published an article whose title is "A Meaningful Lawsuit – *Worker's Daily* was Sued for Defamation"; the trial court of the reported case sued *Democracy and Legal System* by the reason that this article "wilfully distorted and decried the trial activities and the decision, seriously defamed the court's reputation". *Democracy and Legal System* lost in the first instance and appealed.[114] Such tension is apparently different from what it might be in a jurisdiction where the independence of the judiciary and media are better established, which will be further developed in Chapter 5.

1.3. Do They Care? – The Reaction from the Administration of Justice to Public Opinion

This part will discuss whether Chinese judges care about public opinion in high profile cases, how "public opinion" is perceived by Chinese judges, and how Chinese judges deal with or react to intense public opinion.

Chinese judges are expected to care about public opinion at some point. The people are perceived to be of great importance in state ideology, e.g. every court is called the people's court and every judge is called the people's judge, as they are expected to be. It is a legal duty for Chinese judges to serve the people.[115] Courts and judges are supposed to

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[110] Benjamin L. Liebman, 'Watchdog or Demagogue? The Media in the Chinese Legal System', *Columbia Law Review*, Vol. 105, No. 1, 2005, p. 59.
[111] ibid, p. 112.
[112] ibid, p. 92.
[113] ibid, p. 113.
[114] Leng Jing, 'A Court Sued a Media – Thinking Inspired by a Defamation Lawsuit' (从法院状告新闻媒体谈起——一起名誉侵权官司所引发的思考), *Peking University Law Review*, Vol. 2, No. 1, 1999, p. 267-280.
[115] Article 3, Chapter 1, Judges Law of the PRC.

provide legal service to the people,[116] and endeavour to work to the people's satisfaction.[117] For example, in its annual work report of 2010, the SPC indicates that it should "handle the cases which have relatively great influence on the society carefully and properly", "inform the society about the progress of the trial in time and reply to the social concerns".[118] It also highlights that the courts "have opened 853 emails in order to increase channels of collecting public opinion", "actively accepted scrutiny from all sectors of the society" and "listened to the opinions of the media and the internet users carefully and improve our work continuously".[119] In 2009, the SPC enacted a judicial document regarding the requirements of the communication with the public.[120] "The Key Issues of Work of the People's Courts in 2011", which is issued by the SPC, provides that all of the courts should

> listen to the people's opinions and suggestions on the work of courts in time; find out the society's comments on the work of the courts by opinion polls and many other kinds of methods; carry out actively the activities to create the courts and judges who are satisfying to the people.[121]

Guided by such law and policy, it is very difficult for any judge to simply ignore public opinion. This might explain why the Chinese judges make an effort to persuade the public, during or after the trial, that the procedure and the decision are fair in light of the evidence and the law. For example, in the case of drag-racing in Hangzhou, suspicions emerged and developed that the defendant on the stand might not be the real perpetrator Hu Bin, because of the significant difference between the published photos of Hu Bin at

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[116] Li Lifeng, 'It is Judges' Glorious Mission to Serve the Overall Situation and Administer Justice for the People' (为大局服务、为人民司法是法官的光荣使命) (*Chinacourt*, September 4th 2009) <http://www.chinacourt.org/html/article/200909/04/372557.shtml> accessed April 26th 2014. More special coverage on this subject is available at: <http://www.chinacourt.org/zhuanti/article_list.php?sjt_id=435&kind_id=1&list_article_page_next_page=1>.

[117] Li Shaoping, 'Adhere to the Satisfaction of the People as the Ultimate Standard of the Performance of the Administration of Justice' (坚持把人民满意作为 检验司法业绩的根本标准) (*Tianjincourts*, October 26th 2010) <http://tjfy.chinacourt.org/public/detail.php?id=14845> accessed April 26th 2014.

[118] Wang Shengjun, 'The Work Report of the SPC' (最高人民法院工作报告) (*Xinhua*, March 18th 2010) <http://news.xinhuanet.com/politics/2010-03/18/content_13192577_1.htm> accessed April 28th 2014.

[119] ibid.

[120] SPC, *The Suggestions on Strengthening the Work of the Communication with Public Opinion by the SPC* (最高人民法院关于进一步加强民意沟通工作的意见), Document Number [2009] No. 20 (法发〔2009〕20 号), April 13th 2009.

the accident scene and the defendant on the stand.[122] Under great pressure, the trial court -- Xihu District People's Court of Hangzhou, sent a fax to *Xinhua Net* to confirm that the defendant at the trial is Hu Bin and the court asserted that the identification of Hu Bin was verified through strict judicial procedure.[123] Subsequently, a person was put in administrative detention by the police as the punishment for disseminating the rumour and misleading public opinion.[124] After announcing the judgment, the court also held a press conference to explain why it reached the decision and addressed the public's concerns, e.g. why Hu Bin was found guilty of "causing a traffic accident" rather than "endangering public safety by dangerous means" which is more serious and where the death penalty is applicable.[125] Apart from press conference, judges might also accept interviews or provide a written reply to journalists. For example, in Li Qiming's case, the trial court gave a written reply to the questions about conviction and sentence raised by some journalists. [126]

In attempting to avoid controversy after the trial is concluded, Chinese judges even test public opinion before they make their decision. For example, in Yao Jiaxin's case, the court distributed questionnaires to the 500 members of the audience of the trial to collect their opinions on , for example, sentencing; as a judge stated that this case was very influential, and the court attempted to "listen to different opinions by this way, so that the collegiate penal can consult the result of the questionnaires and also consider the arguments of both the prosecution and the defence, and therefore to ensure the final

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[121] SPC, *The Notice about Printing and Circulating "The Key Points of Work of the People's Courts in 2011" by the SPC* (最高人民法院关于印发《二〇一一年人民法院工作要点》的通知), Document Number [2010] No. 1 (法发[2010]1 号), January 14th 2011.
[122] Li Shuming, 'The Substitute of Hu Bin: Wrong Target?' (胡斌"替身门"：打错了靶子？), *Procuratorial Daily*, August 5th 2009, p. 5.
[123] 'The Court of Xihu District of Hangzhou Replied to the Rumour on the Internet: Hu Bin's Identification is Confirmed without any Doubt' (杭州西湖法院回应网络传言：胡斌身份确认无疑) (*Xinhua*, July 27th 2009) <http://news.xinhuanet.com/legal/2009-07/27/content_11782090.htm> accessed February 7th 2014.
[124] Fang Lie and Dai Jinsong, 'The Person Who Fabricated and Spread the Rumour of 'Hu Bin's Substitute' Has Been Detained According to The Law' (捏造散布"胡斌替身"谣言者被依法行政拘留) (*Xinhua*, August 24th 2009) <http://news.xinhuanet.com/legal/2009-08/24/content_11937179.htm> accessed February 7th 2014.
[125] 'Why Hu Bin Received Three Years Imprisonment: The Presiding Judge of the Drag-Driving Case in Hangzhou Explained the Result' (胡斌为啥判三年:杭州飙车案审判长详解审判结果) (*Xinhua*, July 20th 2009) <http://news.xinhuanet.com/legal/2009-07/20/content_11740050.htm> accessed February 6th 2014.
[126] Zhu Feng and Bai Mingshan, 'Why Did Li Qiming Received Six Years' Imprisonment?' (李启铭为何被判刑 6 年？) (*Xinhua*, January 30th 2011) <http://news.xinhuanet.com/legal/2011-01/30/c_121041887.htm> accessed April 28th 2014.

judgment is more fair"; and it was not the first time that they seek opinions on sentencing from the audience of a trial.[127] However, the representativeness of the audience is problematic. 400 of the audience were university students and most of them are from the same university as the defendant; at the same time, a lot of rural residents who requested to watch this trial (the victim is from rural area) were refused because of the court's restriction on the numbers of the audience residing in rural areas.[128] The trial court did not publicize the result of the questionnaires. However, postings such as "Yao Jiaxin must be executed" are very common on the internet. In the first instance, Yao Jiaxin was found guilty of murder and received the death penalty.

What is discussed above suggests that Chinese judges are concerned about public opinion. They are especially concerned about the opinions expressed on the internet, as is evident from various policy documents and speeches by the senior judiciary, e.g. in "The Suggestions on Strengthening the Communication with Public Opinion by the SPC", the SPC requires each court to improve the communication with *netizens* (internet users) and leaders of the courts at each level should participate into direct communication with *netizens* at least once a year in order to learn their opinions.[129] Recently, several online systems have been also developed to observe online public opinion about particular topics and generate reports. These products are developed by either the authority's media providers or commercial companies. Several examples of the former are: public opinion detection system of "Justice Net", which is established by *Procuratorial Daily* and its official website – jcrb.com whose name is "Justice Net" and it claims that this system is customized for political and legal organs including the judicature;[130] "The situation of online public opinion", which is published by *People's Daily* and its official website *People.com* twice per week since 2009 and the topics are not specialized to legal cases, [131] and it also has a special channel of reporting the situation of public opinion on its official website.[132] An example of the commercial products is the "military-dog online public

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[127] Yang Changping, 'Follow-up Report of Yao Jiaxin's Case: the Tribunal Distributed Questionnaires, Audience became Jurors' (药家鑫案件续: 法庭发问卷调查 旁听变"陪审") (*China.com*, April 13th 2010) <http://www.china.com.cn/news/txt/2011-04/13/content_22353197.htm> accessed April 28th 2014.
[128] ibid.
[129] SPC, *Strengthening the Work of the Communication with Public Opinion*, Article 9, Part 2.
[130] The official website of this system is: <http://zfwlyq.jcrb.com/>.
[131] The official website of this publication is: <http://www.peoplegx.com.cn/spezhibo/wlyqnc/>. It claims that according to the statistics 40% political and party organizations have read it.
[132] The channel is on: <http://yuqing.people.com.cn/>.

opinion monitoring system", which is commercial service.[133] The information resources of these systems are all from internet. What they emphasize are mainly problems and disagreements. However, why has public opinion on the internet been received such great attention from the authorities compared with public opinion of other types?

A noticeable background, as stated by "Justice Net", is: "the internet has become an information distribution centre and an amplifier of public opinion, and online public opinion is the 'weather wane' of society and public opinion", "a survey suggests that around 80% popular topics on the internet are about politics and law", "positive public opinion is not strong yet", and negative public opinion "was stirred up on the internet, which interrupted operation of political and legal organs and seriously damaged their image".[134] Its aim is to "construct positive mainstream public opinion".[135] This suggests that the authority is attempting to influence and construct public opinion. At this point, a critical issue has arisen: public opinion, at least what it appears to be, is subject to influences and is mouldable in China, which will be further discussed in this thesis, especially in Chapter 4 when discussing openness of the justice system and Chapter 5 when discussing censorship of the media and the internet.

However, why are Chinese judges concerned about public opinion? An explanation might be: Chinese judges could be removed from their office if they are responsible for "errors" which cause outrage from the public, which will be further discussed in Chapter 3. In some circumstances, even the judges who did not hear the case might be punished. For example, the accused in an influential fraud case, Shi Jianfeng, admitted that he evaded highway tolls of approximately RMB 368 millions, and was found guilty of fraud and received life imprisonment; the public was shocked by the amount found in the judgment and expressed their doubts about miscalculation.[136] Unexpectedly, Shi asserted that he confessed in order to cover for his brother which was subsequently confirmed by

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[133] The official website of this system is: <http://www.54yuqing.com/channels_2.html>.

[134] 'Introduction of Public Opinion Monitoring System of "Justice Net"' (正义网舆情监测系统概况) (*JCRB.com*, March 1st 2012) <http://yq.jcrb.com/fwtx/201203/t20120301_815159.html> accessed January 24th, 2014.

[135] ibid.

[136] Office of Public Opinion Observation of Justice Net, 'Report of Public Opinion on the "Sky-High Tolls" Case in Yuzhou of Henan' (河南禹州"天价过路费案"舆情报告) (*JCRB.com*, January 24th 2011) <http://www.jcrb.com/yqjc/201101/t20110124_492146.html> accessed February 7th 2014.

his brother.[137] A guilty plea is not legal in China and it is against the principle of discovering the truth and applying the law correctly[138] if judges accept guilty pleas without investigation. The Higher People's Court (HPC) of Henan Province held a press conference to give information about the progress of this case. In the conference, the CPC committee of the HPC of Henan declared that: they would punish the relevant judges as the trial court "did not investigate the case carefully nor check strictly during the trial", "the judgment undermines the image of the people's courts and the people's judges, the dignity of law, and public confidence in the administration of justice"; both the presiding judge and the president of the first criminal tribunal was removed from office, subject to training and further decision; a vice-president of the trial court was suspended from his work and subject to investigation; the president of the trial court would be admonished by a talk; and the condemnation of the trial court would be circulated in the whole province; the HPC would write a review report to the CPC committee and the PLC of Henan Province because it perceived that it failed to provide supervision effectively to the trial court.[139]

Therefore, if one argues that Chinese judges should develop a thick skin and isolate themselves from public opinion, this fails to take account of the systemic context of this issue. As evident in the statement about the online public opinion monitoring systems and the statement of the reasons for punishing those judges involved in the "sky-high tolls" case, the image of the justice system is a significant concern. The appearance of the justice system matters no less than the actual situation. A leader of a local court even encouraged judges to make friends with journalists.[140] The president of a HPC asserted the court should "respond positively to all kinds of online public opinion, change passive

[137] Zhao Getu, 'A Huge Ticket was Issued, the IPC of Pingdingshan was Silent' (重磅"罚单"砸下,平顶山中院沉默了), *Southern Weekend*, January 20th 2011, p. A03.

[138] Article 6, Chapter 1, Part 1, The Criminal Procedure Law of the PRC.

[139] Chen Haifa and Ji Tianfu, 'The HPC of Henan Paid Great Attention to Social Scrutiny and Demanded to Try Shi Jianfeng's Case Fairly According to Law; The Presiding Judge of the First Instance Lou Yanwei and Other Relavant Leaders were Hold Accountable' (河南高院高度重视社会监督 要求依法公正审理时建锋案 一审主审法官娄彦伟和相关领导受到责任追究), *People's Court Daily*, January 17th 2011, p. 2.

[140] Feng Shaoyong's presentation, 'Open Mindedness of Court Management Secures Judicial Impartiality and Justice – Observing Management Innovation from the IPC of Taiyuan's Kindness to the Media' (开放仁和的法院管理理念是司法公平正义的保障——从太原市中级人民法院善对媒体看法院管理创新), *Reporters' Notes*, No. 5, 2010, p. 57.

prevention to positively leading and grasp the initiative in public opinion”.[141] The tension between the court and the media is evident in the attitude of the court towards the media, e.g. “counter attack” and “sniper war” etc. are used to express how the court should arrange some judges to write articles to reply to the “tendentious, emotional, and unreasonable speeches on the internet”.[142] However, an improved image does not necessarily indicate an improved system. Whether the court takes improving their own work seriously is another matter, which will be developed in Chapter 4.

At this point, a further question arises: whether Chinese judges care about public opinion enough to bend the decision in order to please or appease the public? If so, how far is this conclusion applicable and why? If not, what is the stronger influence over public opinion on Chinese judges? These issues will be discussed in the next section.

1.4 Trial by Public Opinion? – Who Has the Last Say on a Legal Case?

Chinese judges appear to bow to public opinion or the “public opinion” perceived by them, e.g. the Liu Yong and Yao Jiaxin decisions triggered outrage from the public and they finally received the death penalty, as discussed previously. However, this evidence is not conclusive, because a judgment made in the light of the law and evidence could also be persuasive to the public, e.g. in Yao Jiaxin’s case, the death penalty is applicable to a murder charge. Also, not every high profile judgement pleases or appeases the public, e.g. the drag-race case in Hangzhou, where the defendant only received three years’ imprisonment. The concern that “public opinion compromises judicial impartiality and independence” presumes that the public have the last say on a legal case and constitutes a major risk to judicial impartiality and independence. The dynamic implied by this argument is: a case has received intensive media coverage and great attention from the public, subsequently the public expressed their opinions in paper media, social media, or on the internet and this constitutes great pressure, finally judges yield to public opinion. However, this is not true in mainland China. This is an issue of who has the last say on a

[141] Qian Feng, ‘Realizing Judicial Impartiality in the Environment of Online Public Opinion’ (网络舆论环境下司法公正的实现), *The People’s Judicature*, No. 19, 2009, p. 14.
[142] ibid.

legal case and this part will discuss the dynamics of public opinion and judicial decision making.

As previously established in section 1.2.3, if a case becomes the concern of the CPC or government leaders, they might instruct the court to deal with the case in a particular way. This indicates that the government is able to and does influence the decision making of legal cases, and the government can decide what public opinion will be influential. Chinese lawyers have sometimes attempted to take advantage of this dynamics for the interest of their clients, e.g. Liu Yong's lawyer told the journalist that he wrote letters to the leadership of the CPC committee of Liaoning, the SPC, and the HPC of Liaoning with attempts to save Liu's life by interference from them.[143] Liu Yong eventually was sentenced to death and executed after the retrial by the SPC. When referring to this case, Sun Liping argues that public opinion could help the disadvantaged groups to claim their interests as the intervention of public opinion could change the result.[144] Therefore, Sun further argues that China is facing a dilemma i.e. "although interference of power often lead to unfairness, under the circumstances of judicial corruption, some apparent unfairness could not be corrected without interference of power".[145]

However, Sun's argument is not always applicable. Public opinion is less likely to have an impact on judicial decision making if it is not a concern of these influential authorities or the higher authority inclines to take a hard line for their own interest especially in politically sensitive cases e.g. Wang Lijun's case where Wang fled to the US consulate in Chengdu. Apart from the government, the CPC especially the PLC, individual government leaders or party leaders, and the People's Congress at different levels could also have influences on the court. Although the last one is legitimate as provided for in the Constitution, all the rest are illegal theoretically according to the law. The internal direct interference in the judicial system to a trial judge might be a court at higher status, a leader of the court or a court of higher status, e.g. the president of the court, and the adjudication committee. All the potential interference discussed above cannot conclude that the public is the major risk of the independence and impartiality of Chinese

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[143] Li Shuming, 'Why the Explanation of Liu Yong's Lawyer Increased My Suspicion about the Amendment of Liu Yong's Sentencing' (律师解释为什么加深我对刘涌改判的质疑) (*Xinhua*, August 29th 2003) <http://news.xinhuanet.com/newscenter/2003-08/29/content_1051896.htm> accessed April 28th 2014.

[144] Sun Liping, *Imbalance*, p. 46-47.

judges. This will be developed in Chapter 3 when discussing the situation of judicial independence in China.

This dynamics is relevant to the position and the nature of the courts in China: the court is not only an institution of dispute resolution but also bears a social governing function, evident by what the vice-president of the SPC -- Shen Deyong stated: "the judicial power is one of the most important and effective means of social management".[146] In routine cases, the court exercises its power independently to resolve disputes according to the law. In the cases of significance and great influence on the society, the court has to consider social stability which is particularly stressed in China, and to co-operate with the procuratorate, the police, and the government. What decision serves this interest best is subject to the discretion of the CPC and the government rather than judges, this is why, as previously discussed, that in *Sanlu*'s contaminated milk powder case, the court refused to file and hear any case presented by victims' parents before the government set-up the standards of compensation. Therefore, whether intense public opinion constitutes "public opinion supervision" – legitimate public scrutiny in the state ideology or a risk of judicial impartiality is subject to the discretion of the authoritarian state in individual circumstances, which suggests dual-standards. This explains why on one hand "guiding public opinion to a correct direction" is frequently stated by the senior CPC leadership and the senior judiciary regarding the topic of public opinion and judicial impartiality. The crucial issue raised by such statement is: who can decide what the "correct" decision is? The answer is apparent following the logic of an authoritarian state. If public opinion does not concern anything sensitive, the problem might be addressed to appease the public and avoid more turbulence. Otherwise, the authority is able to silence the public by censoring information or repatriating citizens who speak out, which will be developed in Chapter 5. On the other hand, the authority could declare that they represent public opinion and take advantage of it as a justification of their decision, e.g. in propaganda reporting of a court's decision on a case, a frequent expression is: the decision "has achieved good legal effect

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[145] ibid, p. 175.
[146] 'Shen Deyong: Judicial Power is One of the Most Effective Methods of Social Management' (司法权是最有效的社会管理手段之一), *Reference for the Party and Political Cadre*, No. 12, 2010, p. 15.

and social effect”,[147] which is to demonstrate that the decision is made in light of law and evidence and at the same time is well accepted by the society, and is part of the judicial policy.[148]

Therefore, this thesis argues that in an authoritarian state such as China in the sense that the judiciary is subordinate to the state power, freedom of speech is subject to various restrictions for the interest of state power, and its democracy would not be recognized in the sense of western liberal democracy, if the public could directly assert pressure on the judiciary and influence their decision making, it would constitute a challenge to state power, which is against the nature of authoritarian rule. China’s concern about public pressure in high profile cases might be interpreted to be an anxiety to the threat from the public and to the monopoly of the power of governing rather than a concern about public opinion’s potential negative impact on the rule of law. This thesis will develop this argument in Chapters 2, 3, 4 and 6 by analyzing the situation of impartiality and independence of the Chinese judiciary, the openness of the justice system, and public participation in the Chinese justice system.

Concluding Remarks

In recent years of mainland China, intense public opinion is triggered by high profile cases. Chinese scholars are concerned that public opinion could compromise the impartiality and independence of the Chinese judiciary. They have been debating on this topical issue from a legal or more jurisprudential perspective and it becomes a densely researched area. This chapter has provided background information of this debate with primary analysis, and concludes at this stage that intense public opinion on high profile cases is more complicated than a pure jurisprudential issue of judicial impartiality or judicial independence but closely associated to its social and cultural context in China. This chapter has also raised relevant issues which will be further developed in the following chapters. The next chapter concerns a key concept of this thesis “judicial

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[147] Qi Liming, ‘Conviction without Penalty: Perfect Combination of Legal and Social Effect’ (定罪免处，法律效果与社会效果完美结合) (*Gannan Court of Heilongjiang Province*, March 15th 2013) <http://qqhergn.hljcourt.gov.cn/public/detail.php?id=220> accessed February 8th 2014.

[148] SPC, *Several Opinions on Implementation of the Penal Policy of Combining Severity and Leniency by the SPC* (最高人民法院关于贯彻宽严相济刑事政策的若干意见), Document Number [2010] No. 9 (法发〔2010〕9 号), February 8th 2010.

impartiality”. When Chinese scholars draw insights from Anglo-American jurisprudence to analyse China’s problem, terms such as “judicial impartiality”, “judicial independence” etc. might deviate from its implications in Anglo-American jurisprudence, because the context is different. The next chapter will analyse this concept in China’s distinctive social, cultural and political context, in order to develop more in-depth understanding about what “judicial impartiality” is regarding public opinion in China.

CHAPTER TWO

DEFINING AND DEFENDING JUDICIAL IMPARTIALITY IN THE CONTEXT OF THE INFLUENCE OF PUBLIC OPINION

Introduction

The previous chapter has provided an elementary analysis of the background of the debate on public opinion and judicial impartiality in China. It is established that the perceived problem that public opinion might undermine judicial impartiality is more than a technical legal/jurisprudential issue in China's context. Rather, it might be a symptom of other problems, e.g. problems of independence, incompetence, the corruption of Chinese judiciary, public concern about the problems of social inequality etc. It is also established in the previous chapter that public opinion might not be as powerful as it appears to be, which will be further developed in Chapters 3 and 6; and several key terms in this debate need further clarification in context, e.g. judicial impartiality, judicial independence, public opinion.

This chapter will focus on the discussion of judicial impartiality. More specifically, this chapter will critically analyse the term "judicial impartiality" used in Chinese research literature by drawing insight from western research literature especially Anglo-American jurisprudence, and then discuss how applicable is the conventional western wisdom to the analysis of China's situation, which is often employed by Chinese research literature, as established in the introduction of this thesis.

A comparative perspective is relevant because: 1) judicial impartiality is a widely accepted value which is provided by the *Universal Human Rights Declaration* that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal

charge against him"[149] and this declaration was adopted without any dissenting vote, and therefore it is a universal value endorsed by all the member countries of the United Nations; 2) the concern about the influence of public opinion on judicial decision making is not only openly expressed in China but also in other jurisdictions e.g. the US, especially as regards the relationship between the US Supreme Court and the majoritarian opinion of the public, which will be discussed in this chapter. By applying a comparative approach, it is also to discuss whether there is any variation of the same term or the same expression of values in different political, cultural and social contexts.

Before starting the analysis on the substance, this chapter will establish the rationale of this research first: why does it matter if the judicial decision making process is influenced by public opinion? A conventional argument is, as stated above, that the influence from the public might undermine judicial impartiality and independence. However, this argument might face challenges include the following.

First, in order to make a better decision on a controversial issue, why should judges not keep their minds open to more and diverse opinions from the public? Public opinion or public outrage could serve as an information source warning of an error which judges might regret. Second, judges should serve the people (which is particularly stressed in China's state ideology, as established in the previous chapter) and, therefore, their judgments should reflect the people's opinion. Third, if a particular decision is expected to please most people, why not do this to maintain public confidence? Especially if one argues that judges should endeavour to maintain public confidence in the justice system which is of great importance for its efficiency and a decision which deviates from public opinion is adverse to this. Fourth, one might argue law making is only justified by the democratic process or values, and if a judge's decision involves such activity, it will only be justified by consulting public opinion, which particularly concerns common law jurisdictions where judges can make and develop law. Fifth, in a jurisdiction such as China where the judiciary is often perceived to be incompetent and even corrupt, the benefit of public scrutiny is apparent, and the previous chapter has discussed Chinese scholars' arguments on the positive impact of public opinion's influence on the administration of justice.

[149] Article 10, The Universal Declaration of Human Rights.

These counter-arguments suggest that the complexity of this issue defies any easy and simple assertions. If it could be established that the public opinion's influence on judges might undermine judicial impartiality and judicial independence and should be isolated for the interests of justice, a question might arise: what does "judicial impartiality" and "judicial independence" indicate in different contexts? Is it possible for judges to be impartial, as public opinion is not the only extra-legal factor which might compromise this value? The answers to these questions depend on how the role of judges and the nature of their work are perceived in different societies and legal systems.

This chapter will focus on the issues related to judicial impartiality and discussion on the issues of judicial independence will be developed in the next chapter. The first section will discuss "judicial impartiality" in Anglo-American jurisprudence and several standards which are internationally accepted. Next, regarding the established definition of judicial impartiality, against the background of a crisis of judicial impartiality, this thesis will establish its argument of the influence of public opinion on judicial decision making. These analyses will provide a comparative perspective of a further analysis on China's problems established in the previous chapter. As a result of the fallibility of judicial decision making or misunderstanding of the public, public criticism becomes inevitable. How to avoid public misunderstanding and how to maintain public confidence without compromising judicial impartiality within public communication are two tough issues before every court. An analysis of these two issues and its plausible counter measures will be given in the third part. At the end of this chapter, this thesis will demonstrate where it stands with regard to the issue of whether public opinion should influence the judicial decision making process, and the issues which will also be discussed in the next chapter will be given.

2.1 Defining Judicial Impartiality

It is a legal duty for judges to be impartial in numerous jurisdictions. For example, the *International Covenant on Civil and Political Rights* (ICCPR) provides "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent

and impartial tribunal established by law."[150] China has signed but not yet ratified this Covenant. However, China's domestic law provides that judges must adjudicate impartially in light of law and evidence.[151] The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) also provides "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[152]

Judicial impartiality is a well accepted value and also a legal duty of judges. However, what counts as being "impartial"? This part is addressed to elaborate the term "judicial impartiality" by drawing insights from Anglo-American jurisprudence and the well accepted international standards, in order to establish the foundation of the critical review that this thesis will give. It concerns what is justifiable and what is not during the judicial decision making process rather than in the substantial content of the decision. The term 'an impartial decision', used in this thesis, refers to a decision made through an impartial process and does not indicate any comment on the substantive content of the decision. By drawing this boundary, this chapter is intended to indicate what it will discuss rather than get into the controversy of whether there is outcome impartiality other than procedural impartiality.[153]

The content of judicial impartiality is explained by international and domestic judicial conduct guidelines, statutes and case law. By consulting these materials, this thesis argues that there are two basic elements of judicial impartiality: first, freedom from bias, prejudice and favour; second, open mindedness in considering all the relevant and accurate facts. They will be developed in this section. Apparently, an impartial judiciary should be competent and free from corruption and fear, which is still a public concern in mainland China, as established in the previous chapter. However, this section will focus on other relevant issues, e.g. unconscious bias of judges, impartial decision making in hard cases etc., and will look at the problems of corruption and incompetence of Chinese judiciary when discussing public confidence towards the justice system.

[150] Article 14, Paragraph 1, International Covenant on Civil and Political Rights.
[151] Article 7, Chapter 3, Judges Law of the PRC.
[152] Article 6, European Convention for the Protection of Human Rights and Fundamental Freedoms.

2.1.1. Free from Bias and Prejudice

To insulate judicial decision making process from prejudice or bias is crucial to maintain judicial impartiality, which is acknowledged by *The Bangalore Principles of Judicial Conduct*.[154] However, what constitutes a bias or prejudice and how to recognize it?

In *Black's Law Dictionary*, judicial bias is interpreted as "bias that a judge develops during a trial... must be personal or based on some extrajudicial reason."[155] Prejudice is interpreted as "a preconceived judgment formed without a factual basis; a strong bias".[156] This chapter will not distinguish prejudice and bias and will use both to indicate partiality.[157] The *Commentary on the Bangalore Principles of Judicial Conduct* defines bias or prejudice as that which "represents a predisposition to decide an issue or cause in certain way which does not leave the judicial mind perfectly open to conviction".[158] For example, in a controversial case, if a particular decision is made to cater to the moral belief of the judge, the decision making is partial and unfair. However, if a judge carefully weighs different values and considers what is agreed with law, even if the decision is compatible with his or her personal moral belief, it is less likely to be accused of being biased. For example, in an abortion case where the law about abortion is not decisive, there is no consensus achieved on this issue in society and the judge is personally against abortion unless the fetus endangers the mother's life. The woman' wants to terminate pregnancy because it is a result of rape; however, her life is not endangered by pregnancy in this case. If the judge makes a decision against the woman's request, this decision is coincidently compatible with the judge's moral belief. However, the decision making process is still impartial if this personal belief is not involved in reasoning. If the judge

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[153] William Lucy argued impartiality is more than an attitude and it includes both procedural impartiality and outcome impartiality. See William Lucy, 'The Possibility of Impartiality', *Oxford Journal of Legal Studies*, Vol. 25, No. 1, 2005, p. 8.
[154] Economic and Social Council of United Nations (ECOSOC), 'Bangalore Principles of Judicial Conduct', Value 2.
[155] Bryan A. Garner (eds), *Black's Law Dictionary* (7th edition, West Group 1999) p. 153.
[156] ibid, p. 1198.
[157] Nugent distinguishes bias from prejudice. He explained that "prejudice may be more overt and forceful, while bias has a tendency to be less overt and more sublime". See Donald C. Nugent, 'Judicial Bias', *Cleveland State Law Review*, Vol. 42, Iss. 1, 1994, p. 3. This subtle difference will not make a significant difference in the discussion of judicial impartiality in this thesis, so this chapter will not distinguish them.
[158] United Nations Office on Drugs and Crime (UNODC), 'Commentary on the Bangalore Principles of Judicial Conduct', September 2007, paragraph 57, p. 59.

refuses the woman's request only because he is morally disgusted by this request, or he approves the woman's request only because of sympathy, the decision making is not impartial because the judge's bias is involved or even decisive in the decision making process.

In the previous example, bias is exemplified as a kind of preference. However, as Ofer Raban argues, not all kinds of preference are bias, e.g. a judge is not being partial if he or she prefers an honest litigant to a dishonest one; therefore, he argued that only unjustifiable preference can be bias, which includes preference which is wrong or neither right nor wrong.[159] The reason given by him is that preferences are controversial and often "reflect the self-interest of the chooser", "the use of such beliefs as considerations in legal determinations can consistently benefit or injure certain individuals or groups".[160] However, does bias only reflect the self-interest of the decider and if the judge prefers to decide the case by consulting public opinion, is this justifiable preference?

Bias includes judges' personal bias, and external bias which might be involved in judicial decision making process, e.g. gender bias or racial bias in the community. Public opinion could be, but does not always constitute, an external bias. If a judge is aware that he or she would give a different decision without public pressure, public opinion influences adjudication as an external bias. However, a judge is also a member of his or her community and might share some biases as "values" with the community. The perceived public opinion by a judge might be internalized to become a personal bias but the judge might not be conscious of this impact on his or her judgment. The rules of recusal might be consulted to recognize bias in practice, however, they mainly concern whether the judge has personal interests which might cause bias. As evidence of what is in judges' minds is unlikely to be available, it is difficult to obtain evidence on whether judges are influenced by public opinion nor not, unless in situations when judges are conscious of it and admit it. What is practical might be to select and appoint judges who could act in good faith and keep scrutiny on their conduct. Judges' conduct and speech inside and outside the courtroom might be the most accessible evidence of their good faith. Therefore, "a judge shall not, in the performance of judicial duties, by words or

[159] Ofer Raban, *Modern Legal Theory and Judicial Impartiality* (The Glass House Press 2003) p. 1.
[160] ibid, p. 111.

conduct, manifest bias or prejudice towards any person or group on irrelevant grounds."[161] Judges also have duty to "prevent lawyers engaging in racist, sexist or other inappropriate conduct" "in proceedings before the court".[162] In summary, conducts or speeches which might invite reasonable doubt about their intention of impartiality should be avoided by judges.

2.1.2 Open Mindedness: Considering All the Relevant and Accurate Facts and Law

In the previous section, it is established that judicial impartiality indicates a decision making process that is free from bias. If judges make decisions by drawing lots, which excludes even the unconscious bias that judges might have, does this constitute an impartial decision making process and is this desirable considering the values of the rule of law? The answer is no. Judicial impartiality

> is more than a narrow preclusion against bias or prejudice concerning certain persons... It is, more broadly, an affirmative duty to 'maintain an **open mind** in considering issues that may come before the judge'. Impartiality in this sense is the core element of fairness and neutrality in the administration of justice.[163]

Matthew H. Kramer also argues impartiality includes not only disinterestedness but also open-mindedness, which includes the absence of prejudice, favouritism and whimsicalness and impetuosity.[164] Open mindedness indicates that judges equally consider all the relevant and accurate facts supported by evidence presented and issues in an unbiased way. Open mindedness is, therefore, crucial for judicial impartiality especially when the legal issues involved are controversial and no conclusive answer is available in law, as it could contribute to a sounder decision. Therefore, deciding a case through a random process is not impartial although it is neutral and free from any partiality and corruption; because it ignores the relevant facts and issues; it is "blind...

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[161] UNODC, 'Commentary', p. 124.
[162] ibid, p. 127.
[163] Donald L. Burnet, 'A Cancer on the Republic: The Assault upon Impartiality of State Courts and the Challenge to Judicial Selection', *Fordham Urban Law Journal*, Vol. 34, 2007, p. 272.
[164] Matthew H. Kramer, *Objectivity and the Rule of Law* (Cambridge University Press 2007) p. 54-59.

generates uncertainty, and denies reason";[165] and excludes consistency which is especially important in sentencing.

The judicial decision making process is also a process of collecting relevant information. Whether in inquisitorial or adversarial mode, each party should have the opportunity to participate and express their views in case the decision maker might ignore some vital information,[166] and impartiality should be based on all "reasonably accessible information that is both accurate and relevant".[167] Open-mindedness is called for by the diversity of the society and culture, and therefore judges have to be aware of and well informed about that diversity. The Bangalore Principles indicate the duty for judges "to be responsive to cultural diversity" and that they should take "educational opportunities" to help with this - to assist judges "to be and appear to be impartial" - but it emphasizes that "it is necessary to take care that these efforts enhance, not detract from, the judge's perceived impartiality".[168] This raises the issue of the diversity of the judiciary.

William Lucy argues that both the individual judges and the entire judiciary should reflect the diversity of the community where they work: "calls for a more representative judiciary are therefore surely calls for a judiciary better able to understand, and less likely to pre-judge, the experience, background and situation of those before them".[169] This thesis argues that to be open-minded suggests that judges keep their mind open to all the relevant differences which are presented before them, rather than that they should have the same kind of or a better understanding than anyone else that has such experience; e.g. a judge does not have to be disabled to understand that disabled litigants need assistance, nor has a judge to be homosexual to understand that a homosexual litigant should be treated equally. Experience and background might be associated with a better understanding; however, they might also lead to preconceptions. If to be representative indicates to represent the community, perhaps juries or the judges elected by the people could be more representative of the community. This idea suggests that a judge's gender, race, ethnic origin or life experience can determine whether he or she can be impartial and competent to some extent, which is problematic.

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[165] Neil Duxbury, *Random Justice on Lotteries and Legal Decision-Making* (Oxford University Press 1999) p. 3.
[166] Kramer, *Objectivity*, p. 60.
[167] ibid, p. 64.
[168] UNODC, 'Commentary', paragraph 186, p. 123.

An apparently simple method to achieve a diverse judiciary is by quota. The independent Advisory Panel on Judicial Diversity in England and Wales has made it clear that "there should not be diversity quotas or specific targets for judicial appointments",[170] because "talent is not concentrated in people from one particular gender, ethnic or other background".[171] The actual connection between judicial impartiality and the judicial diversity campaign is that effort might be taken to select judges from a wider range and thereby clear the barriers which prevent some members from unrepresented groups, who are eligible to be a judge, from being a judge, and therefore enhance the possibility of a higher quality judiciary who could be more able to be impartial. This understanding is also compatible with what is suggested in the explanatory notes of the *Tribunals, Courts and Enforcement Act 2007* on enlarging the pool of judicial appointment to reduce obstacles to judicial diversity.[172] This thesis agrees with this idea because the ability to be impartial is not concentrated in a particular social group.[173] This thesis argues that to constitute a certain type of judiciary on purpose, no matter whether it is diverse or homogenous, could be problematic. An example is the Chinese judiciary and the People's Assessors (PAs). The Chinese judiciary predominantly consists of the CPC members, and the PAs also lack diversity, because of purposive construction of their composition through selection criteria, which will be developed in Chapter 3 and Chapter 6.

Another issue that has arisen in the previous discussion of open mindedness is: whether a fixed opinion of a legal issue constitutes partiality. This thesis argues that it is both justifiable and practical for judges to have their own opinion on controversial legal issues, if they equally consider other opinions. As Justice Scalia argued, impartiality does not suggest that judges should not have "preconceptions on legal issues", but rather that they should be "willing to consider views that oppose his preconceptions, and remain

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[169] Lucy, 'Possibility of Impartiality', p. 15-16.
[170] The Advisory Panel on Judicial Diversity (APJD), 'The Report of the Advisory Panel on Judicial Diversity 2010', p. 20, rec. 5.
[171] ibid, p. 32, paragraph 97.
[172] 'The aim is to increase the pool of those eligible for office, but the current system of merit-based appointment will remain." See Note 288, explanatory notes on *Tribunals, Courts and Enforcement Act 2007* <http://origin-www.legislation.gov.uk/ukpga/2007/15/notes/division/4> accessed May 19th 2014.
[173] This might enhance the appearance of judicial impartiality and public confidence. A possible but not definite result is that the judiciary might become more and more diverse. Its potential impact on judicial impartiality is: there are controversial legal issues which do not have conclusive answers; different views held by different judges can help each other to keep their mind open. They can exchange ideas in judges' training or other activities of the community of judges. Or they can be informed by reading other judges' judgments.

open to persuasion".[174] However, will more information increase the possibility of bias rather than improve impartiality? This thesis argues that this contingent phenomenon actually suggests that if a decision-maker is not open minded, the more information he or she gets, the more likely it is that he or she may confront a piece of information to reinforce the already existing personal bias and close their mind to other relevant information, and, therefore, generate a partial decision. Psychological research suggests that confirmation bias or pre-decisional distortion might occur in the legal decision making process, e.g. Carlson and Russo find that mock jurors could seek and reinforce the information which is consistent with their prior-beliefs.[175] This phenomenon indicates the fact of a closed mind to other relevant and accurate information rather than an open mind. It suggests that limited information will narrow a decider's mind and generate partiality in the opposite way.

2.1.3 Judicial Impartiality as Both a Matter of Fact and Appearance

Previously, it was discussed what judicial impartiality should be as a matter of fact. However, judicial impartiality is more than this. In the first part when discussing bias, it was established that judges should be cautious about their speech and conduct to avoid reasonable doubt about their faithfulness to impartiality, which actually concerns the appearance of judicial impartiality. This thesis argues that the appearance of judicial impartiality is also indispensible to judicial impartiality. "Because appearance is as important as reality in the performance of judicial functions, a judge must be beyond suspicion."[176] The actual impartiality "protects the due process rights of litigants" and the appearance of impartiality "preserves public confidence in the judiciary".[177] The importance of the appearance of impartiality is stated by the *Bangalore Principles of Judicial Conduct* in Article 2.2: "a judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary". Therefore, judges' legal duty to be impartial requires them to be and also to appear to be impartial.

[174] *Republican Party of Minnesota v White* 536 U. S. 765 (2002).
[175] Kurt A. Carlson and J. Edward Russo, 'Biased Interpretation of Evidence by Mock Jurors', *Journal of Experimental Psychology: Applied*, Vol. 7, No. 2, 2001, p. 91-103.
[176] UNODC, 'Commentary', paragraph 110, p. 83.
[177] *Republican Party of Minnesota v. White*, 536 U. S. 765 (2002).

The appearance of judicial impartiality as an indispensible part of judicial impartiality is also established in case law. In *Morris v. United Kingdom*, the European Court of Human Rights (ECtHR) defines judicial impartiality as follows:

> As to the question of "impartiality", there are two aspects to this requirement. Firstly, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.[178]

This definition of judicial impartiality, in both the subjective and objective respect, is also adopted by the *Commentary on the Bangalore Principles of Judicial Conduct*.[179] A Turkish judge, Kemal Sahin, summarizes this definition as a distinction between subjective impartiality and objective impartiality.[180] This distinction is a different rhetoric of the actuality and appearance of impartiality. This chapter will use the terms of actuality and appearance in later discussion. The latter is no less important than the former because otherwise it would undermine public confidence on the administration of justice. As stated by the old adage "justice should not only be done, but should be manifestly and undoubtedly seen to be done",[181] judicial impartiality must not only be done but must be seen to be done. It is stressed in the case law of the ECHR as previously discussed, and it was also adopted by the previous judicial ethics canon of China.[182]

Since the significance of the appearance of judicial impartiality has been established, a relevant question arises: how to recognize a failure of the appearance of judicial impartiality? The failure could be either actual bias or a reasonable doubt of bias. However, from whose perspective? "The perception of impartiality is measured by the

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[178] *Morris v United Kingdom* (2002) 34 EHRR. 52, paragraph 58, [Findlay v United Kingdom (1996) 21 EHRR CD7].
[179] UNODC, 'Commentary', paragraph 53, p. 57-58.
[180] Kemal Sahin, 'Impartiality of the Judiciary', *Ankara Bar Review*, No. 1, 2008, p. 17. These two terms are also used by other literature, e.g. Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, 'Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers' 2003, p. 137.
[181] *The King v Sussex Justices* [1924] 1 K.B. 256.
[182] SPC, *The Fundamental Rules of Judges' Professional Ethics of the PRC* (中华人民共和国法官职业道德基本准则), October 18th 2001, Article 1, 10, 11 of Part 1 and Article 45, 46 of Part 6; this is replaced by the more recent *The Fundamental Rules of Judges' Professional Ethics of the PRC*, Document Number [2010] No. 53 (法发〔2010〕53 号), December 16th 2010, and these articles stressing the appearance of impartiality in the previous ethics canon are missing from the more recent one which only provides a very general duty for Chinese judges to "maintain the image of the administration of justice".

standard of a reasonable observer."[183] The reasonable observer refers to a "'reasonable, fair-minded and informed person' who 'might believe' that the judge is unable to decide the matter impartially",[184] which has been previously established in the English case law.[185] Therefore, the perception of parties of interest, e.g. the defendant's perception, should be taken into account but is not decisive, because their interest is at stake and thereby they might be biased. With regard to the debate on public opinion and judicial impartiality, is the public a collective of "reasonable, fair-minded and informed" observers? This will be analysed in the next part when discussing public opinion's influence on judicial decision making.

Other than bribery, corruption, and a direct personal interest which could be proved by evidence, and the conduct and speech which appear to be biased could be observed, it is difficult to prove actual bias. This suggests that the judge is assumed to be impartial if there is no evidence or reasonable doubt. When a judge is commented on as not being biased, it might imply more than the judge is actually not biased. There might be three interpretations:

> that actual bias need not be established because reasonable apprehension of bias can be viewed as a surrogate for it; that unconscious bias can exist even where the judge is acting in good faith; or that the presence or absence of actual bias is not the relevant inquiry.[186]

According to the above, judicial impartiality is established if there is no evidence or reasonable doubt of bias, which makes it possible to expect judges to be impartial. However, the impossibility thesis argues that judges are not able to exclude any bias and prejudice from their decision making process, e.g. behavioural science[187] and neuroscience research[188] suggests that it is impossible or nearly impossible to achieve an

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[183] UNODC, 'Commentary', paragraph 52, p. 57.
[184] ibid, paragraph 77, p. 68.
[185] *Director General of Fair Trading v Proprietary Association of Great Britain* [2001] 1 W.L.R. 700 [85].
[186] UNODC, 'Commentary', paragraph 82, p. 60-70.
[187] For example, Donald C. Nugent applied behavioural science to the analysis of judicial decision making process and concluded "it is a difficult, if not nearly an impossible, task for judges to separate themselves from all of the various limitations and influences on perception that produce bias in judicial decisions". Nugent, 'Judicial Bias', p. 20.
[188] For example, personal belief can influence the evaluation of evidence. See Jonathan A. Fugelsang and Kevin N. Dunbar, 'A Cognitive Neuroscience Framework for Understanding Causal Reasoning and the Law' in Semir Zeki and Oliver Goodenough (eds), *Law and Brain* (Oxford University Press 2006) p. 157-166.

absolute exclusion of bias in decision making. Also, some judges admit that it is difficult to recognize unconscious bias.[189] However, to establish judicial impartiality by whether there is evidence or reasonable doubt of bias largely translates the question of possibility to be whether it is possible to expect judges to act in good faith. The answer is positive, e.g. in England, according to very limited materials, the public generally trusts that judges can apply the law impartially.[190]

However, only emphasizing appearance might cause ignorance of the substantive impartiality, because judges' conscious bias could be concealed by their cautious speech and conduct. With regard to this deficit of formalized adjudication, Chinese people's concern on substantive impartiality and fairness and the integrity of judges is understandable, even when some of the Chinese courts become more formalized but bureaucratic.[191] In the previous chapter, it is established that some expressed opinions in some high profile cases that suggest a crisis of public confidence towards the impartiality and other judicial virtues in China, despite the efforts of propaganda to sell a different story, which will be developed in Chapter 4 when discussing show trials and in Chapter 5 when critically analysing the Chinese media. This suggests that the authority might attempt to construct a deceitful image of the performance of the justice system to the public while less effort is taken to address to the real causes of the problems, because it might be in contradiction to the interest of the state power or the party in power. This argument will be developed in the following chapters by critically analyzing the situation of judicial independence and the openness of the justice system in China, and the censorship of the media and the internet. The next section will discuss the perceived crisis of judicial impartiality in a number of jurisdictions including China, which shows that the concerns of the Chinese public about the justice system and the judiciary are not groundless.

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[189] As a Canadian judge pointed out, the more systemic judicial bias is unconscious bias, which is from limited personal life experience, e.g. Canadian judges are lack of the life experience of working class, which constitutes an obstacle to impartiality. See Maryka Omatsu, 'The Fiction of Judicial Impartiality', *Canadian Journal of Women and the Law*, Vol. 9, Iss. 1, 1997, p. 6-7.
[190] Lords Select Committee on Constitution, 'Constitution-Sixth Report' (*Parliament.uk*, July 11th 2007) <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15102.htm> accessed April 29th 2014, paragraph 141.
[191] Xin He, 'Court Finance and Court Responses to Judicial Reforms: A Tale of Two Chinese Courts', *Law & Policy*, Vol. 31, Iss. 4, 2009, p. 463–486.

2.2 A Crisis of Judicial Impartiality: A General Commentary on the Influence of Public Opinion on Judicial Decision Making

2.2.1 A Perceived Crisis of Judicial Impartiality

In the previous part of this chapter, the definition and criterion of judicial impartiality has been established, this part will apply this to the analysis of the influence of public opinion on judicial decision making. The conventional perspective is that public opinion should not influence judicial decision making, as it would compromise judicial impartiality and judicial independence and undermine the rule of law. As the *Basic Principles on the Independence of the Judiciary* provides, "the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[192] This statement also concerns the issue of judicial independence, which will be studied in the next chapter. As a result of intense public opinion on high profile cases in China, concerns on the crisis of judicial impartiality are expressed in research literature as established in the introduction and Chapter 1.

In contrast, public opinion's influence on judicial decision making is rarely studied as a significant concern in English research literature, although English judges might be regarded to be "entitled...to have regard to public opinion, though not necessarily follow it".[193] If judges also read newspapers or watch TV programmes, they are also open to the influence from media or the "public opinion" conveyed by the media. However, as Sir Mark Potter argued, "judges take a judicial oath and receive judicial training which they take seriously and which render them well aware of their obligation to put matters of personal opinion to one side when deciding the cases before them", because the "public opinion" expressed in the media is legally irrelevant and "are almost invariably based on incomplete and inadequate knowledge of the facts of the particular case as well as (on

[192] Article 2, UN Basic Principles on the Independence of the Judiciary.

frequent occasion) on a misunderstanding of the legal issues involved".[194] He asserted with confidence that in criminal justice, judges and magistrates decided whether the defendant is guilty or not only by the facts established by evidence and the law,[195] although concerns about public opinion's or even political influence on judges in criminal justice does not vanish, e.g. after the riots occurred in London at 2011, the British public was outraged and supported tougher sentences as well as some politicians e.g. David Cameron, and coincidently, some of the sentences were perceived to be "disproportionate and somewhat hysterical".[196]

The concern about public opinion's influence on judges is also expressed in the US. The awareness is shared within American scholarship that the US Supreme Court might be influenced by public opinion because many decisions by the US Supreme Court agree with American majoritarian public opinion.[197] Mishler and Sheehan find that public opinion could have an impact on the US Supreme Court through but not limited to changes of the ideological composition of the membership of the US Supreme Court, facilitated by public opinion's influence on the Congress and the party of the president.[198]

With regard to the perceived crisis, there might be a concern that public opinion's influence on the judges might compromise their impartiality. The public might be ill informed and therefore their views could be skewed and partial, even where the crisis of judicial impartiality is not perceived to be significant. The public's attitude or perception should not be decisive in legal cases as the criteria of reasonable doubt about prejudice and bias is based on the consideration of an informed, fair minded and reasonable person, not the public. A number of researches on public opinion and criminal justice evidence that the public are ill informed and biased. For example, youth crime is a social concern in England. According to a report, "people over-estimate the proportion of crime for which

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[193] Sir Mark Potter, 'Do the Media Influence the Judiciary', The Foundation for Law, Justice and Society, <http://www.fljs.org/sites/www.fljs.org/files/publications/Potter_PB.pdf> accessed February 27th 2014, p. 3.
[194] ibid.
[195] ibid.
[196] Adam Gabbatt, 'British public supports harsher sentences over riots' (*The Guardian*, August 23rd 2011) <http://www.theguardian.com/uk/2011/aug/23/british-supports-harsher-sentences-riots> accessed February 27th 2014.
[197] Thomas R. Marshall, 'American Public Opinion and Rehnquist Court', *Judicature*, Vol. 89, No. 3, 2005, p. 177.
[198] William Mishler and Reginald S. Sheehan 'The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions', *American Political Science Review*, Vol. 87, Iss. 1, 1993, p. 96.

young offenders are responsible”, [199] “many people over-estimate the percentage of youth crime involving violence”,[200] and “most people over-estimate the proportion of young offenders who are reconvicted”.[201] The media mainly mislead the public to believe the youth crime was rising but in fact it was not.[202] This misinformation largely shapes the public’s comments on youth justice, e.g. “youth court sentences perceived to be too lenient”.[203] At this point, an issue arises: if the public could be ill informed and biased, why should the justice system still be open to public scrutiny and what sense could public scrutiny still make? This will be discussed in Chapter 4 when the conventional defence of the principle of open justice is critically analysed.

In mainland China, the privileged and affluent are repugnant to the public, and this attitude could be understood as a reaction to a failure of equity and social justice, as established in the previous chapter. However, if this attitude is translated into the judgment of the court, it might lead to a judgment based on legally irrelevant facts. Absence of bias and prejudice, as part of judicial impartiality, should include not only what are in favour of but also against parties from certain background. Judges are of blood and flesh like any other human beings, and they might also develop personal feelings e.g. disgust or frustration at cases. However, it would be against the value of judicial impartiality to give a judgment solely driven by such feelings. This thesis does not argue that judges should not develop feelings but argues that judges’ personal feelings should not be involved in the decision making process. As established in the previous chapter, the Chinese public might be concerned about: if the privileged break the law, whether they could possibly escape from the punishment that they deserve by putting pressure on judges or bribing judges. This concern is about whether judges can decide a case without fear or favour, which might impede judges from giving a judgment in accordance with their convictions when they act in good faith. This suggests that a lack of independence and corruption has undermined the Chinese public confidence in the judiciary’s impartiality. Therefore, if these two problems are not tackled, it is unlikely to expect any

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[199] Mike Hough and Julian V. Roberts, *Youth Crime and Youth Justice Public Opinion in England and Wales* (The Policy Press 2004) p. 11.
[200] ibid, p. 13.
[201] ibid, p. 14.
[202] ibid, p. 17.
[203] ibid, p. 25.

improvement of public confidence even if Chinese judges bow to such attitudes and portray themselves to be tough on the privileged and affluent offenders.

The discussion of the drawback of public opinion raises the issue of what public opinion is. It is also necessary to elaborate in what sense this thesis uses the term "public opinion". Literally, public opinion is a loose concept which suggests what the public thinks about or the true state of all kinds of opinions the whole public hold. Public opinion in such sense is distinguished from the opinion conveyed by the media, or any particular idea hold by a group of the public including the majority opinion. It is of great methodological difficulty to discover public opinion in this sense. The opinions "represented" by the media are not necessarily public opinion of this sort. An opinion poll might also fail to discover public opinion in this sense. Accurate public opinion is not always accessible and is not relevant to judicial reasoning. Even if public opinion is made available by an opinion poll e.g. done by a press media, there might be divided or competing opinions within the public, which does not constitute any certain instruction to judges. Unless specified, this thesis uses the term of public opinion in the broad sense, which can be opinions on a particular case or a legal issue. Some research might use public opinion for the majority opinion of the public, e.g. research on the majority opinion and US Supreme Court as previously discussed. In the sense of the majoritarian opinion, this thesis argues that judges are not elected politicians nor are courts democratic institutions. The administration of justice should not be politics. Judges are not under an obligation to represent the majority or any particular social group, and they should insulate themselves from the public controversy and deliver their decision according to law. Their fidelity is to law rather than any social groups or any political party.

Interestingly, empirical research finds that several respondent judges in Queensland showed their interests in taking account of "informed public opinion" in sentencing, and judges' view of public opinion could be formed by "judge's own general knowledge", "contacts in the community" e.g. friends, family, neighbours etc., and the media with great caution, although other respondent judges have the opposite perspective.[204] However, many respondent judges perceived that public opinion is often influenced by the media and misinformed.[205] Another research finds the general view of the interviewed

[204] Geraldine Mackenzie, *How Judges Sentence* (Federation Press 2005) p. 135-161.
[205] ibid, p. 135-161.

English judges at crown courts is to only consider "informed public opinion" or the opinions of "right thinking members of the community" instead of public opinion.[206] However, what counts to be "informed public opinion"? Judges tend to "project the views of their own social groups into their sentencing decisions", and "tend to believe that their own attitudes are similar to what significant other people expect of them".[207] This suggests the methodological problem of taking public opinion account into the criminal justice which was discussed previously.

Within an independent and impartial judiciary, the opinions judges usually take account of does not include public opinion.[208] If a judge bends to the pressure of public opinion, it might be out of fear of criticism from the public or the possibility of being punished or even removed from his or her office due to public criticism. The former might be caused by judges' anxiety about their reputation. Under such circumstances, judges should develop a thick skin and never compromise their impartiality in a particular case merely to please the public, as public confidence of the judicial system relies on their impartiality and independence. The latter might occur where institutional protection for judicial independence is not established, e.g. mainland China, which will be developed in the next chapter. To deal with this problem calls for a reform of the legal system rather than simply blaming judges for lacking a thick skin. In the next section, this chapter will develop arguments to support where this thesis stands with regard to the issue of public opinion's influence on the judicial decision making process.

2.2.2 A Further Analysis on Public Opinion and Judicial Decision Making

In the previous section, it is established that public opinion is a cause of the concern about judicial impartiality in a number of jurisdictions to variable degree. This section will develop and defend this thesis's argument on public opinion and judicial decision making. This thesis argues that the influence, especially the decisive influence, of public opinion on judicial decision making is unjustifiable. The reasons are given as follows:

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[206] Andrew Ashworth *et al.*, *Sentencing in the Crown Court: Report of an Exploratory Study* (Centre for Criminological Research, University of Oxford 1984) p. 31-32.
[207] ibid, p. 32-33.
[208] For example, Law lords of the UK. See Alan Paterson, *The Law Lords* (The Macmillan Press Ltd 1982) p. 9-34.

Firstly, to decide a case by public opinion is to impose a certain group of people's (regardless whether they are the majority) values or opinions instead of law on the parties in dispute, which would undermine the rule of law. It erodes the power of the legislature and jeopardizes democracy if the law is passed through democratic process e.g. elected representative parliament. Even if the legislative process lacks in democracy, it might not be justified that the judicature should take over the responsibility to represent the people. Su Li argued, "China is a massive country and public opinion is inevitably local", the unification of law and the sovereignty might be damaged if the judicature directly take public opinion.[209] Moreover, public opinion could be fabricated or employed by those who are able to influence adjudication in China. For example, as Su Li argues, "without adequate and effective mechanism to collect public opinion and institute of discussion and decision-making, some small but powerful interests groups might take advantage of judicature".[210] "Public opinion" could be also used by the government to put pressure on the court in the name of the "exercise state power for the people" and "administrate justice for the people", although this influence is more concealed.[211]

Secondly, the parties in dispute have a right to know who decides their case, and who decides the case should be whom they presented their case to and argued before. The parties also have a right to an impartial and independent tribunal. It would be in contradiction to such rights if the case is decided on the ground of public opinion of any kind. The parties in a legal dispute present their case to a court of law, not a court of public opinion. A tribunal that cannot be independent from the influence of public opinion is neither independent nor impartial, this is illegitimate *per se* as it infringes the parties' right and procedural fairness, even if otherwise the decision would still be the same.

Thirdly, if public opinion, instead of the law, is the decisive ground of a case, the individuals might be deprived of the protection against the majority's oppression. Even if the law in a certain state fails to fulfil this function, the measure is a reform of the law rather than acquiesce in public opinion influencing the administration of justice without any constraints.

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[209] Su Li, 'Formalism, Public Opinion and Hard Cases' (法条主义、民意与难办案件), *Peking University Law Journal*, Vol. 21, No. 1, 2009, p. 106.
[210] ibid.

This thesis also argues that exclusion of public opinion's influence on the judicial decision making process does not automatically suggest exclusion of public scrutiny even if the public could be misinformed. One might argue that it is not practical to isolate adjudication from public opinion in a jurisdiction where corruption, incompetence and non-independence of the judiciary is a major concern and public confidence is in crisis such as China, and so public opinion might have a positive impact on outcome fairness. However, this consequentialism approach ignores the negative impact it might have on the rule of law. To be clear, by arguing for the exclusion of public opinion's influence from adjudication, this thesis does not suggest shielding a corrupt and incompetent judiciary from public scrutiny in China. The coordinated measures alongside the position of this thesis is: to deal with the problems identified and to establish an independent, impartial and competent judiciary with integrity. More specific, if the problem is the incompetence of some judges, the measure is to appoint eligible candidates; if the pay cannot attract the eligible candidates, the measure is to increase the pay; if the problem is a lack of independence or integrity of the judiciary, the measure is a reform of the current judicial system. It is a very complex issue on how to establish a judiciary which could meet the criteria of the rule of law for China, which is a separate issue that this thesis is not going to study.

Judges do not bear the responsibility to please the public. They need "judicial fortitude" and "must do right in the face of any potential public criticism".[212] If an independent, competent and impartial judge acts in good faith and gives a judgment which frustrates the public, no one has a right against this judge to revise the judgment and the judge is not obligated to get into the controversy with the public. Errors or even miscarriage of justice might occur. If a judge amends an error in the judgment in the interests of justice, which coincidently is compatible with public opinion, it is still justifiable because the judge is doing justice rather than enforcing the public opinion. However, this might lead to the impression of public opinion compromising judicial impartiality and therefore scholars might argue that the judge should not revise the

[211] Sun Xiaoxia, 'The Political Mechanics of Adjudication – Analysis on the Relationship between the People, the Media, the Government, the Parties and Judges' (司法的政治力学——民众、媒体、为政者、当事人与司法官的关系分析), *China Legal Science*, No. 2, 2011, p. 60.

decision under such circumstances because it appears to be under the pressure of public opinion, e.g. in Li Changkui's murder case, it is perceived by a number of legal scholars and lawyers that the court of appeal amended the sentence in the retrial under the pressure of the angry public and has caused controversy.[213] Judges are also subject to criticism from the legal scholars. However, it is rarely discussed whether the scholars' intention of influencing judges is legitimate. In the UK, judges are also subject to the influence from academia's works and criticism, but in a very indirect way of persuasion rather than "stronger and more coercive sanctions".[214] One former law lord even stated that he rarely read legal journals because they were not critical enough.[215]

2.2.3 A Critical Analysis of the Proposal of a Representative and Diverse Judiciary

As a result of the concern about the problems of judicial impartiality, the proposal for a diverse judiciary becomes popular, i.e. the judiciary is expected to reflect the diversity of the society.[216] For example, the Judicial Appointments Board of Scotland declares its consideration of "recruiting a Judiciary which is as representative as possible of the communities which they serve". [217] Some female judicial office holders also suggest that "more women would make judicial office more representative".[218] A representative judiciary might arguably represent opinions of different social groups and reduce the gap between the judiciary and the public, and this issue might also be relevant in a country such as China where judges are regarded as the people's judges and work for the people. However, two crucial questions are: representative of what and why? Another reason to analyse this proposal is that judicial diversity is perceived to be helpful to enhance public confidence in the judiciary,[219] which is related to public opinion. Judicial

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[212] Lord Judge, 'Opening of the New Legal Year' (*Judiciary.gov.uk*, October 12th 2008) <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-remarks-opening-legal-year-winchester-cathedral-12102008.pdf> accessed April 29th 2014.
[213] For example, Yang Xingpei, 'Li Changkui's Case: The Retrial Should not be Started Readily' (李昌奎案：本不应轻启刑事再审程序), *Oriental Law*, No. 5, 2011, p. 10-17.
[214] Paterson, *Law Lords*, p. 11-12.
[215] ibid, p. 15.
[216] APJD, 'Judicial Diversity', p. 15, paragraph 25.
[217] Judicial Appointments Board for Scotland, *Annual Report 2002-2003* (Scottish Executive 2003) p. 3.
[218] Dermot Feenan, 'Women Judges: Gendering Judging, Justifying Diversity', *Journal of Law and Society*, Vol. 35, No. 4, 2008, p. 510.
[219] ibid, p. 491, 510.

diversity's contribution to public confidence is defended not only from being more representative itself but also the prospect of different attributes, e.g. women judges may bring "empathy, respect for other people, patience, ability to recognize equality issues, and being able to communicate well with members of the public and with colleagues in the profession".[220]

Ofer Raban concludes that judicial impartiality is impossible because preference is unavoidable in legal interpretation and whether the problems of preference are true or false are "the subject of pervasive disagreements among reasonable and well informed people", and therefore his response to this problem is a diverse judiciary under the condition that there is not only one right legal answer.[221] However, this response is questionable because a less diverse judiciary does not indicate a definite consensus on every controversial legal issue. Judges' decisions might be affected but not directly decided by their background or personal experience. For example, on some most difficult legal issues, there would be different opinions among judges in the Supreme Court of UK even if most of them are "pale and male".

Ofer Raban's argument might imply that a lack of diversity could cause ignorance of certain views and therefore affect the substantive decisions of cases, which has also been expressed by Lady Hale. When giving evidence on the judicial appointment process, Lady Hale stated that "in disputed points you need a variety of perspectives and life experiences to get the best possible results. You will not get the best possible results if everybody comes at the same problem from exactly the same point of view".[222] She gave an example of whether the damage of an unwanted child is merely "a matter of financial loss" or of "wrongful invasion of... bodily integrity and autonomy", where women have the experience of having a child might look at the issue in the second way while a man might or might not.[223] A number of female judges also share the perspective that different experience will bring a different dimension.[224]

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[220] ibid, p. 512.
[221] Raban, *Modern Legal Theory*, p. 111-112.
[222] House of Lords Select Committee on the Constitution, *25th Report of Session 2010–12 Judicial Appointments Report* (The Stationery Office 2012) p. 31, paragraph 90.
[223] House of Lords Select Committee on the Constitution, 'Inquiry on Judicial Appointment Process, Evidence Session No. 7' (*Parliament UK*, November 2nd 2011) <http://www.parliament.uk/documents/lords-committees/constitution/JAP/corrCNST021111ev7.pdf> accessed May 23rd 2014, q. 226.
[224] Feenan, 'Gendering Judging', p. 510-512.

The response of this thesis is: it appears that female judges could represent women's interests better than male judges; however, it might be the special life experience which help female judges have a better understanding of fairness and equity on certain legal issues, which might be ignored by male judges. What is represented by female judges is fairness and equity, which are crucial legal values for everyone, not only for any particular person or group's best interests. In these examples, female judges bring different dimensions which may inform judging but not a different way of judging.[225]

The logic of Ofer Raban's argument is to compensate the impossibility of judicial impartiality by a diversity of bias and preference in the judiciary so as to increase the chance that different individuals or groups can have a chance to get an advantageous decision. This would introduce an element of luck: whether the judge presiding over their case has a preference which is in favour of them. However, adjudication should not be a lottery.

A possible lack of understanding caused by a lack of experience on some issues indicates the need of regular training for judges when they are on the bench, which could help judges become aware of their potential ignorance or unconscious bias and therefore improve open mindedness and provide them with a better understanding of diversity of the society. This also suggests that the ability and talent to be a judge does not concentrate on a certain group, and therefore an unbiased selection process might generate a more diverse judiciary; however, there is no way to rush to it. In this context, regular judicial training is of great importance, which is acknowledged by the Adversary Panel on Judicial Diversity.[226] Also, judges refer to academic work from time to time and if academia can provide diverse views to inform judges, it might dilute the negative effect of a less diverse judiciary's ignorance on some issues.[227] Another problem exposed by this example is: when gaps in law emerge, the legislature should fulfil their function to fill the gap rather than leave them entirely to judges.

It might be argued that the UK Supreme Court, whose rulings may affect the general public, should be diverse and representative of the diverse preferences in the society. With

[225] In North Ireland, generally female judges do not suggest that they bring a distinctive way of judging or decide differently from male judges. See Feenan, 'Gendering Judging', p. 510, 513, 517.
[226] APJD, 'Judicial Diversity', p. 10, rec. 32.

regard to its presumption of the inevitable preferences, this thesis will give two counter arguments. Firstly, whether a more diverse judiciary will lead to a significant change is still uncertain as it is very hard to obtain conclusive empirical evidence. Secondly, this point of view raises a question -- which preference should be represented more? Judges' decisions reflect law and the values of law including fairness and equality; they are not representing any particular individual or group's preference or interests, which is against these two fundamental legal values. To be clearer, this thesis is not against the diversity of the judiciary itself, as a better judiciary might be a more diverse judiciary; however, it argues against intentionally constructing a diverse judiciary merely for the sake of diversity by the reason stated above.

2.3 The Paradox of "Judicial Impartiality" in China: Judicial Impartiality in Context

The discussion of judicial impartiality above is primarily based on the western literature. However, simply applying the criteria of judicial impartiality in the west to China might be problematic because it is isolated from the context.

The importance of a competent and impartial judiciary for adjudication is also acknowledged in both law (as previously established) and the professional ethics code concerning judges' conduct in China.[228]However, the reality is perceived to be problematic by Chinese judges and scholars. For example, according to a survey, some Chinese judges assert that they cannot avoid preconceptions in their work;[229] some of them might have to defer to another authority within or outside of the judiciary e.g. Chinese judges might have to deliver a judgment according to the decision by the adjudication committee which the case is not presented before, which will be developed in Chapter 3 when discussing judicial independence in China. This survey therefore

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[227] Although there are judges read academic work, this thesis does not presuppose every judge regularly read legal journals, e.g. there are several former law lords only read them occasionally or hardly read them and therefore academic's potential influence on them is likely to be very limited. See Paterson, *Law Lords*, p. 15.
[228] The Professional Code of Judges of the PRC, (中华人民共和国法官职业道德基本准则), amended December 6th 2010; The Code the Judges' Conduct (法官行为规范), amended December 6th 2010.
[229] Research Team of the HPC of Sichuan Province, 'The Survey Report of Public Confidence in the People's Courts' (人民法院司法公信力调查报告), *Journal of Law Application*, No. 4, 2007, p. 39.

acknowledges the crisis of public confidence in the judiciary in China.[230] This suggests that generally the Chinese judges fail to be and fail to appear to be impartial even by the criteria of China.

This part will critically analyse the paradox of judicial impartiality in China's distinctive legal, cultural and political context, in order to advance the understanding of how judicial impartiality is developed in context. The paradox of judicial impartiality in China that this thesis refers to includes three aspects: 1) the contradiction between the influence of the tradition and the part of contemporary legal culture which is influenced by the western wisdom (the traditional culture still remains influential in some respects which will be developed in this section); 2) the contradiction between what is demonstrated in the state ideology and the reality; 3) the same rhetoric which is used in the western literature especially in Anglo-American jurisprudence and its varied content in the context of China (this will be discussed with the discussion of the first two aspects). This thesis expects to provide more in-depth understanding of judicial impartiality from these three respects in context through this part.

2.3.1 Influence of Tradition?

The traditional Chinese legal system collapsed over a century ago. However, the influence of the traditional culture and perceptions of law and judges does not vanish completely with the previous legal system. This part will discuss the traditional Chinese perceptions of law and the role of judges, which roots in the social and cultural background, and therefore understanding could be limited by analysis which is solely based on the law on paper.

2.3.1.1 A Limited Explanation from Confucianism

What is Chinese legal tradition? At first, Confucianism had a strong influence on how China's traditional legal system and legal thoughts shaped. It is widely accepted within Chinese scholarship that from "judging cases by *Chun Qiu*"[231] in Western *Han*

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[230] ibid.

[231] It was proposed by Dong Zhongshu who is a Confucian scholar. It refers to when there were problems about ethics in cases and the current law then did not have clear regulations or there were regulations but they contradicted ethics, the moral principles expressed in Confucian classic works e.g. *Chun Qiu* should be applied to decide the case.

Dynasty Chinese law has been confucianized.[232] Also, from the Western Han Dynasty when the suggestion of "proscribing all non-Confucian schools of thought and supporting Confucianism (as the only orthodox state ideology)", Confucianism became the orthodox political and legal theory. However, Chinese legal tradition does not only consist of Confucianism and has not been always dominated by Confucianism all through the ancient China.

The conventional debates were on rule of man and rule *by* law rather than rule of law. Rule by law is argued by Legalists while rule of man is typically argued by Confucians. Based on the acknowledgement of the flaws of law, Confucians prefer the rule of man and suggest a hierarchy of social rules, where the highest one is morality while the lowest one is law, and ritual is in the middle. The reasons why morality is at a higher hierarchical level than law are argued by Zhang Weiren as:

> morality is closest to rationality and human feelings and therefore is most easily to be accepted; law and edicts could be compatible with rationality and human feelings although this is not necessarily so, because they are made by authorities, who might not be fair or wise and usually legislate for their own interests, and therefore law lacks the ability to prove its legitimacy and needs to be tested against morality, which is the first flaw of law. The second flaw of law is there must be gaps… which call for morality to fill. The third flaw of law is pointed out by Xun Zi more specifically that as law is less easily to be accepted than morality and its enforcement relies on authority's force, which are no more than reward and punishment and appeal to the human nature of going after profits and avoiding disadvantages but profits and disadvantages are relative and people will weigh them before making decision to obey or not obey the law…[233]

Besides, the local government head was also the judge of the local jurisdiction, and was regarded to be the "parental cadre", as Shuzo Shiga argued, this suggests the judge is "'the master of a family' who looks after the local order and social welfare", and the judicial work is part of it; therefore, Shuzo Shiga argued that the concept of right could not be developed within such litigation structure, which is distinctive from the western legal

[232] For example, Qu Tongzu, *Collection of Qu Tongzu's Essays on Law* (瞿同祖法学论著集) (China University of Political Science and Law 2004) p. 364-368.
[233] Zhang Weiren, 'The Origin, Development and Characteristics of Chinese Legal Culture (Part 1)' (中国法文化的起源、发展和特点（上）) *Peking University Law Journal*, Vol. 22, No. 6, 2010, p. 809.

tradition.[234] Such litigation pattern reflects the influence of the rule of man and a legal culture without awareness and shared values of right is unlikely to initiate the rule of law.

The emphasis on judges' personality and moral merits is likely to be a result of the rule of man. Xun Zi (BC313-BC238), a representative Confucian scholar, argued more specifically for the importance of judges. He perceives the people who are responsible for applying the law as more important than the law itself. Firstly, Xun Zi argued that law is made and enforced by people. "If there are not good people, there will not be good law. Or even if there are good laws, without good people, they cannot be enforced properly."[235] Secondly, Xun Zi argued that "there could be some people who can keep society decent and in order while there is no law can achieve this".[236] He explained that law cannot always respond to the social changes and *jun zi* (gentlemen of good moral character and behaviour) do not have this problem.[237] Therefore, he concluded that people are the essence of law.

Because of the perceived flaws of law, *qing li* plays an significant role in traditional Chinese legal culture, which still remains influential in the contemporary Chinese legal culture and will be developed later. *Qing Li*, as explained by Shuzo Shiga, refers to "perceptions towards what is just and fair in commonsense".[238] Shuzo Shiga further explains that, compared with the similar term in the western legal tradition, Chinese *Qing Li* "does not isolate the target of disputes, but systematically and comprehensively considers the social relations of parties in disputes… and Chinese tend to seek the balance between allocating variable amount of loss and suffering to each party"; therefore, he argued that *qing li* is an indefinite sense but influence the judge's decision making.[239] "As long as the decision does not radically go against the law, Chinese judges did not have to be constrained by the details of words in law… It is the responsibility of the local cadre (judge) to seek concrete and appropriate solution according to *qing li*."[240] Application of *qing li* calls for deliberation of a wide range of relevant and variable details and

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[234] Shuzo Shiga, 'An Review of Chinese Legal Culture – Based on the Pattern of Litigations' (中国法文化的考察一以诉讼的形态为素材), *Journal of Comparative Law*, Vol. 3, 1988, p. 25.
[235] The expression in simplified Chinese is "故法不能独立，类不能自行，得其人则存，失其人则亡。" See Xun Zi, *Xun Zi · Jun Dao*.
[236] The expression in simplified Chinese is "有治人，无治法". See Xun Zi, *Xun Zi · Jun Dao*.
[237] ibid.
[238] Shiga, 'Pattern of Litigations', p. 24.
[239] ibid.

circumstances of each individual case, and flexible interpretation of the black letter law, and, therefore, judges' qualities such as personal ability, wisdom, values, and integrity become crucial. Otherwise, it might provide opportunities of abuse of power which might lead to corruption or miscarriage of justice. However, what is perceived to be relevant by the traditional Chinese judges might not constitute being legally relevant from the perspective of western judges, as it is previously established that Chinese judges review disputes in a different way from the western judges. This is a matter of differences between cultures rather than a matter of what is more civilized or barbaric, as Shuzo Shiga argued that Chinese legal tradition and Western legal tradition both have their own strengths and drawbacks.[241]

One might argue that judging cases by taking account of *qing li* might lead to unpredictability of the judicial process. However, as Zhang Weiren argued, in a traditional closed society, values and common sense could be identified and accepted by the majority,[242] and, therefore, the decision could still be predictable. Also, Zhang Weiren argues that a judgment which clashes with *qing li* is difficult to be accepted and implemented by the parties, and the case might eventually be solved by moral values or *qing li* which is accepted by the related parties.[243]

Qing Li still remains influential in the contemporary Chinese legal culture. *Qing* literally means feelings and social relationships, and *li* literally means rules and values. Chinese people's expectation is for a judgement "to be in accordance with *qing li*", and a number of cases that do not involve complex legal issues, however, because controversial *qing li* involved, they become difficult cases for judges.[244] This is why, as established in the previous chapter, the popular image of Chinese judges is as a good person of virtue, e.g. "an understanding, considerate, and thoughtful woman".[245]

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[240] ibid.
[241] ibid, p. 25.
[242] Zhang Weiren, 'The Origin, Development and Characteristics of Chinese Legal Culture (Part 2)' (中国法文化的起源、发展和特点（下）) *Peking University Law Journal*, Vol. 23, No. 1, 2011, p. 15.
[243] ibid, p. 16.
[244] Wu Yingzi, '"Rural Gong and Drum should only be Played in Rural Areas" – The Communication Strategy for Law and *Qing Li* Adopted by Chinese Judges of Primary Courts in Rural Areas' ("乡下锣鼓乡下敲"——中国农村基层法官在法与情理之间的沟通策略), *Journal of Nanjing University (Philosophy, Humanities and Social Sciences)*, No. 2, 2005.
[245] Su Li, 'The Image of Chinese Judges: thinking on the working method of Chen Yanping' (中国法官的形象塑造_——关于"陈燕萍工作法"的思考), *Tsinghua Law Review*, No. 3, 2010, p. 82, 77.

This is also why in the contemporary China's political ideology, the "social impact" of adjudication is stressed to be no less important than its "legal effect" (deciding cases according to law), e.g. by the former vice-president of the SPC.[246] "Once the case is closed in the courtroom the dispute must be also concluded" (*an jie shi liao*) is particularly stressed within the Chinese court system.[247] However, what is in accordance with law is not necessarily in accordance with morality, especially considering the great diversity of a massive country such as China. A report of a court indicated that one of the many reasons why some cases were closed in court but the disputes were still not solved is that some law is out reach of the reality of the Chinese society and could not be understood or accepted by some people.[248] This perhaps is part of the reasons why in China's justice system, especially in its civil justice system, the principle of solving cases is "giving priority to mediation and Combining Mediation with Judgment",[249] and Chinese judges at primary courts often use mediation to solve the case instead of giving a judgment, e.g. according to the annual work report of the SPC in 2012, 67.3% civil cases of the first instance were resolved by mediation and withdrawal of the lawsuit.[250]

Because *qing li* depends on the variable circumstances of individual cases, as Wu Yingzi argues, it becomes part of and dependent upon local knowledge. Also, because of the great diversity of the Chinese society, diversity of values in different regions is also expected. Therefore, the sort of impartiality that Chinese judges need is not only to be open minded to legally relevant issues in a particular case, but also relevant social issues,

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[246] Li Guoguang, 'Persevering the Integration of the Legal Effect and the Social Effect' (坚持办案的法律效果与社会效果相统一), *Studies on Party Development*, No. 12, 1999, p. 5-7.

[247] 'Wan E'xiang: The Major Emphasis of "Combining Mediation and Judgment" is on "Once the Case is Closed in the Courtroom the Dispute must be also Concluded" ' (万鄂湘："调判结合"最主要强调"案结事了") (*People.com*, March 7th 2007) <http://politics.people.com.cn/GB/1026/5446991.html> accessed March 20th 2014.

[248] Research Team the HPC of Guangdong Province, 'The Survey Report of Improving Work to Ensure that Once the Cases are Closed in the Court the Disputes are also Solved' (关于不断改进工作促进案结事了的调研报告) (*Guangdong Courts*, March 20th 2012) <http://www.gdcourts.gov.cn/gdcourt/front/front!content.action?lmdm=LM22&gjid=20120320020835197722> accessed March 20th 2014.

[249] SPC, *Several Opinions on Further Implementing the Work Principle of "Giving Priority to Mediation and Combining Mediation with Judgment"* (关于进一步贯彻"调解优先、调判结合"工作原则的若干意见), Document Number [2010] No. 16 (法发〔2010〕16 号), June 7th 2010.

[250] Wang Shengjun, 'The Work Report of the SPC – at the Fifth Meeting of the Eleventh National People's Congress on March 11th 2012' (最高人民法院工作报告——2012 年 3 月 11 日在第十一届全国人民代表大会第五次会议上) (*Court.gov.cn*, April 13th 2012) <http://www.court.gov.cn/qwfb/gzbg/201204/t20120413_175925.htm> accessed on March 8th 2014.

cultural issues, and the values shared in the local community, which might appear to be irrelevant to their western peers. *Qing li* and the values shared in a local community are not entirely isolated from the expressed opinions on a legal case by the local people, and therefore, the relationship between public opinion and judicial impartiality is rather subtle and complex for Chinese judges. Judicial impartiality in this sense does not only demand a judge's honesty and integrity, but might also demand life experience, knowledge and understanding of the community and the social relationships, and wisdom of solving disputes. Legal qualification, therefore, is not the only criteria for a good judge in China. This perhaps is why "impartiality" is valued both in China and the West, while the legal culture with regard to judicial impartiality appears to be distinctive from each other. This also suggests the variation of the substance of the same legal rhetoric in different contexts.

In contemporary China, judges also have to consider *qing li* because of the potential negative impact otherwise. Wu Yingzi argues that if the judges simply just apply the law without considering *qing li*, it might cause distrust, petitions, suicide of the parties etc., and this will be considered to be errors in their work as "the major function of the court is to maintain social stability", and judges might be attacked by the media and public opinion, the CPC, the government or even be prosecuted.[251] This is in contradiction to the idea of the rule of law imported from the west, and the Chinese judges at the primary courts sometimes confront the conflict between "solving the dispute" and "rule of the rules".[252] However, the potential negative impact of taking account of *qing li* in cotemporary China is associated with its great social transformation. There are influences of various values from other parts of the world brought by globalization. This leads to great diversity of values in China, and there could be competing values. It, therefore, calls for great open mindedness from Chinese judges -- the awareness of the great diversity of values and equally considering competing values. This does not automatically assume that a more diverse Chinese judiciary would be a more impartial judiciary, because if judges just close their mind to their own beliefs it is likely to lead to diversity of biases rather than more open mindedness. (This thesis's critique on the idea of judicial diversity has been given in the previous part of this thesis.) Nevertheless, under such circumstances, it is

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[251] Wu, 'Rural Gong', p. 68.
[252] Lv Fang, *Research on the Culture of Chinese Courts* (中国法院文化研究) (The People's Court Press 2008) p. 212-214.

difficult for Chinese judges to decide what values or *qing li* to choose if it has to be considered, and it might lead to unpredictability and might also creates risks of corruption. This is also why this thesis argues that over-relying on public opinion could compromise judicial impartiality and might undermine the rule of law in China.

The emphasis of *qing li* is relevant to the awareness of law's flaws. The awareness of the flaws of law is not exclusive to China. The flaws of a formalized legal system and adjudication, e.g. failure of the protection of human rights, have also been acknowledged by western scholars. For example, Vivian Curran exemplified "the problem of law's association with evil" by the example of Nazi Germany where the judiciary legitimated persecution.[253]

What is discussed above suggests that Confucianism perceives that people of virtue are more trustworthy than law. However, what counts to be "good judges"? Traditionally, judges' personality and moral character, e.g. integrity, which is related to impartiality, is stressed. However, the perceptions towards impartiality, at least the appearance of impartiality, are varied in China. For example, Bao Zheng (AD999-AD1062), an ancient Chinese judge, is well known for his integrity and honesty. Trusted by the people, he would give a fair judgment even if he sat in the cases where his relatives or members of the royal family were involved. However, it is in contradictory with the criteria of judicial impartiality (as established previously in this chapter), if a judge was to hear a case where the judges' interests might be perceived to be at stake. Because of the inquisitorial nature of the hearing and the "full-function bureau" (which will be developed in the next section), good traditional judges of the wisdom and strategy to discover the truth and solve disputes could possibly receive public trust, as the example of Bao Zheng suggests. The explanation sourced from Confucianism is limited. It is also relevant to the role and status of judges in traditional political structure, which will be developed later when discussing Legalism. An explanation from Confucianism might be "Confucianism views law as a low status rule, thus stresses that people should be educated and civilized at first so that they can obey virtues and rituals which are rules of higher status".[254] As Confucius stated,

> If the people are conducted by edicts and regulated by punishments,
> they will obey in order to avoid punishments but have no sense of

[253] Vivian Grosswald Curran, 'Racism's Past and Law's Future', *Vermont Law Review*, Vol. 28, 2004, p. 683, 692-693.
[254] Zhang, 'Chinese Legal Culture (Part 1)', p. 812.

> shame; if the people are conducted by virtues and regulated by ritual, they will have a sense of shame and become good of their own accord.[255]

To educate and civilize people, according to Confucius, the educators which include judges should be a fine example, otherwise people will not follow.[256]

However, the awareness of the importance of the quality of judges is not initiated by Confucian thought. It was acknowledged in the Western Zhou Dynasty, e.g. *Shang Shu · lv Xing* emphasized that "do not appoint people of artful tongues and without decency to decide criminal cases, rather, only appoint good and honest people to decide criminal cases, the decision should be correct and fair".[257] This statement is relevant to the discretion of judges and some legal principles, e.g. there should be some flexibility of punishment,[258] and a guiding principle – educate and civilize people through virtues and use punishment prudently to avoid overuse.[259] These principles are succeeded and developed thereafter, which call for competent judges to apply. However, there are judges who were corrupted and fail to administrate justice. Confucianism stresses the importance of good judges but fails to indicate how to select and appoint good judges.

2.3.1.2 An Explanation from Legalism and Rule by Law: A Symbol of Authority and Tool of Ruling

The confucianization of traditional Chinese law refers to the substance of law especially the written code, while the structure of state power including the exercise of legislative and adjudicative power is heavily influenced by Legalists. After China's first emperor *Qin Shi Huang* (BC259-BC210) unified China and established the *Qin* Dynasty, Legalism became the orthodox ideology while other schools were all banned. The political and legal institutions were established fundamentally according to Legalism and were followed thereafter by different dynasties although Confucian revived in the

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[255] The expression in simplified Chinese is: "子曰：道之以政，齐之以刑，民免而无耻；道之以德，齐之以礼，有耻且格。" Confucius, *Lun Yu (The Analects) · Wei Zheng*.

[256] "If the ruler is a fine example, people would follow without edicts; if the ruler is not a fine example, even if there are edicts, people will not follow." The expression in simplified Chinese is "其身正，不令而行；其身不正，虽令不从。" See Confucius, *Lun Yu (The Analects) ·Zi Lu*.

[257] The expression in simplified Chinese is "非佞折狱，惟良折狱，罔非在中。" *Lv Xing* is a criminal code of Western Zhou Dynasty (1046 BC-771BC), however, it is lost. *Shang Shu · lv Xing* is not a written code but a historical record of Western Zhou Dynasty's legal system and judicial principles.

[258] The expression in simplified Chinese is "刑罚世轻世重，惟齐非齐，有伦有要。".

Western *Han* Dynasty. The tradition of centralization of political power and rule by law was established.[260] The public power was "ultimately and integrally" concentrated in the emperor and an independent court system was never established.[261]

Although Han Feizi (BC281-BC233), a well known Legalist, argues that law should be applied consistently regardless of people's status,[262] but this is different from the modern legal values that everyone is equal before the law. Legalists attach more importance to law than Confucians, however, they perceive that the aim of law is to make a country powerful rather than to protect human rights or improve people's life.[263] They favour harsh punishment because they perceive it is human nature that people do not like punishment so that they will obey the law.[264] Traditional Chinese judges are unlikely to respect people who get involved in both civil and criminal litigations, as Zhang Weiren argued, that

> traditional Chinese rulers adopted a view of Legalists that good people obey ritual and law, do not break bans; people who commence litigation or breath the law are bad people and should be punished. Thus the rulers perceived the people who get involved into cases are bad people, if they cannot prove they are innocent, they should be detained and punished till they confess, plead guilty and show remorse. Although Confucians are against this point of view, they dislike people of eloquence and people who like to start litigation and therefore are tolerant of the torture of these people.[265]

Under such circumstances, judges could be biased before they hear cases, and it is hard to expect the contemporary legal value of assumption of innocence would be established and applied.

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[259] The expression in simplified Chinese is "明德慎刑".

[260] Gao Hongjun, 'An Modern Review of the Rule by Law at Pre-*Qin* and *Qin* Dynasty' (先秦和秦朝法治的现代省思), *Tsinghua Journal of Rule of Law*, Vol. 8, 2006, p. 59.

[261] Shuzo Shiga, 'Some Remarks on the Judicial System in China: Historical Development and Characteristics' in David C Buxbaum (eds), *Traditional and modern legal institutions in Asia and Africa* (E. J. Brill 1967) p. 46.

[262] "Law should not favour the noble or the influential people, just like an ink line will not yield to the crooked wood. Wherever the law applies, the wise cannot evade, nor can the brave defy. Punishment could apply to ministers, and rewards could also apply to ordinary people." The expression in simplified Chinese is "法不阿贵，绳不挠曲。法之所加，智者弗能辞，勇者弗能争。刑过不避大臣，赏善不遗匹夫。". See Han Feizi, *Han Feizi · You Du*.

[263] ibid.

[264] The expression in simplified Chinese is "夫民之性，喜其乱而不亲其法。". See Han Feizi, *Han Feizi · Xin Du*.

[265] Zhang, 'Chinese Legal Culture (Part 2)', p. 16.

The traditional local judicial system could also undermine judicial impartiality. In imperial China, professional judges and independent courts were not developed at local areas. Generally, the head of the local government was also the head of the local police force, in charge of prosecution and hearing of both civil and criminal cases. This is described as "full-function bureau" by He Weifang.[266] Its influence still remains, e.g. the law provides that the police, the prosecution and the court should co-operate with each other.[267] Within such system, it is hard to expect a "judge" not to develop preconceptions before the trial. Institutions were established in central government responsible for reviewing cases, rectifying errors and supervising local jurisdiction. However, in ancient time transportation and information dissemination was far less developed than nowadays, and therefore it is difficult to expect the central government to be fully informed about the situation of local adjudication. Such "full-function bureau" was unlikely to provide effective institutional protection for people from abuse of power and miscarriage of justice. Therefore, justice is largely dependent on judges' integrity and ability. Lawyer (*Song Shi*) was not established as an independent profession as the people who help litigants were suppressed and often were notorious for provoking lawsuits.[268] It is because: Confucianism does not like the people who favour litigation and are argumentative; and local "judges" perceive themselves as "parental cadre" of the local people, and so lawyers' argument might be incompatible with their opinions and would challenge their authority.[269] Therefore, without independent lawyers, it is even more difficult to expect judges to be impartial and open minded to different opinions and arguments, as it is established previously in this chapter that judicial impartiality also includes open mindedness.

When the rule by law was established, not everyone is equal before the law as the emperor was still above the law. As Shuzo Shiga argued, the Chinese emperor both held and exercised power to deliver punishment which was not provided by law, and such exceptional decisions might become precedent for similar cases in the future and was

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[266] He Weifang, *The Way to Convey Justice* (运送正义的方式) (Shanghai Joint Publishing Company 2002) p. 60-62.
[267] Article 7, Chapter 1, Part 1, The Criminal Procedure Law of the PRC.
[268] Shuzo Shiga, 'Some Remarks on the Judicial System in China: Historical Development and Characteristics' in David C Buxbaum (eds), *Traditional and modern legal institutions in Asia and Africa* (E. J. Brill 1967) p. 48.
[269] Zhang, 'Chinese Legal Culture (Part 1)', p. 847.

often made to be law subsequently.[270] "The principle of *nulla poena sine lege* was unmistakably accepted as a restriction imposed on officials by the emperor, but never as a restriction imposed on the imperial government as a whole by a social contract with the people."[271] Law therefore was served as a tool to rule the people and maintain an emperor's authority, which distinguishes rule by law from the rule of law. Chinese emperors had the last word of legislation, and can legally intervene into adjudication, e.g. hear and decide cases; some emperors even "take it for granted that cases should be decided according to their wish", thus some judges would try to detect the emperor's attitude and then decide cases according to this.[272] It is hard to expect that a few outspoken judges could rectify the institutional defect. After all, these judges are also tools to maintain the emperor's authority and ruling. If judges can obtain independence and impartiality, the emperor's power and authority would be challenged. Perhaps, this is also why the contemporary Chinese judiciary is still not independent, as it might share power with the CPC and challenge their authority and interest, this will be developed in the next chapter when discussing judicial independence.

2.3.2 A Tool of Social Control and Legitimization in an Authoritarian Regime

In China, the judicial system is under the "leadership" of the CPC. Under the orthodox ideology, the CPC claims that it represents the fundamental interests of the most majority of Chinese people[273] and, therefore, announced that all the state organs should be under its leadership to ensure they follow the correct political direction and work for the people. This applies to the judicial system and means that all the courts and judges should be under the leadership of the CPC to ensure they serve the people and deliver justice. In order to deliver justice, Chinese judges have a legal duty to be impartial, as established previously in this chapter. However, there is a gap between what is stated in the state ideology and the reality: the powerful influence of the state power and the CPC over the judiciary could seriously compromise judges' impartiality, e.g. as discussed in the

[270] Shiga, 'Some Remarks', p. 47.
[271] ibid.
[272] Zhang, 'Chinese Legal Culture (Part 1)', p. 829.
[273] General Program, Constitution of the Communist Party of China, amended and adopted at the Seventeenth National Congress of the CPC on October 21st 2007.

previous chapter, in the contaminated milk powder case, the judge has to decide compensation in the case according to the government's particular guidelines for this series of cases. This will be developed in this section and further developed in the next chapter when discussing judicial independence in China.

However, China in the post-Mao period is perceived to be an authoritarian regime by a number of western[274] scholars and Chinese scholars.[275] In an authoritarian regime, the relationship between public opinion and judicial decision making cannot be simplified as the tension between the freedom of speech and judicial independence and impartiality; as freedom of speech and an independent and impartial judiciary is in contradiction with the nature of an authoritarian regime. The state could keep the judicial system under control if the court does not have independent funding system or do not have sufficient funding to maintain their functions. For example, to preserve impartiality, judges should not actively attract litigation or encourage people to present cases to them. However, in a lot of undeveloped areas in China, as the litigation fees are the main resource of courts' funding, judges are motivated to attract potential litigations, which is studied by Xin He's research[276] and criticised by many other Chinese scholars.[277]

Xin He argued that the reason for such phenomenon is the funding of courts is dependent on local government and the local economy, and therefore in urban areas courts are not obsessed by such problems, but "become more formalized and bureaucratic, as it tries to exclude difficult and problematic disputes from getting into the court."[278]

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[274] Pierre Landry, 'The Institutional Diffusion of Courts in China: Evidence from Survey Data' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law The Politics of Courts In Authoritarian Regimes* (Cambridge University Press 2008) p. 207.
[275] Yuhua Wang, 'When Do Authoritarian Rulers Tie Their Hands: The Rise of Limited Rule of Law in Sub-National China' (PhD Thesis, University of Michigan 2011).
[276] He, 'Court Finance'.
[277] A frequently cited example is "The court of Huarong County always keeps the principle of 'there is end of cases but no end of service', keeps on improving service… the county's paper mill hold credits of 282 debtors which is in total RMB 15 million. The paper mill's production has suffered from a serious lack of funding. At the beginning of this year, the county court came to the paper mill on its own initiative to take on the relevant cases, selected very able staff from the court to work on this case in this paper mill. After kept on working for more than 100 days and nights, visited more than 200 debtors in 12 provinces and cities, the court get back RMB 4,620,000 by litigation or non-litigation methods, and saved this mill. When the secretary of county's communist party committee heard the report, he said with feelings that 'this is exactly what we mean by service, this is exactly what we mean by efficiency'." This is reported by *People's Court Daily*, an official newspaper in the charge of the SPC, as a praise on April 4th, 1994, cited by e.g. He Weifang, 'Two Problems of China's Judicial Management' (中国司法管理制度的两个问题), *Social Science in China*, No. 7, 1997, p. 122.
[278] He, 'Court Finance', p. 464.

However, the Court's funding system and different local economic situation is a cause but does not indicate the root. The root is, as Xin He argues, that both courts he studied "largely remain the instruments of the local political power".[279] This thesis argues that within this authoritarian regime, the governing party CPC would keep judicial power, an important part of state power, under its control as a powerful governing aid for its self interest; however, reform might be tolerated to improve the court system's functioning as long as the reform is not perceived to be challenging the state power, which will be further developed in the next chapter.

Although judicial impartiality and independence is permitted in routine cases to maintain social stability for the sake of the ruling of the government, the ruling party will keep control of the adjudication as both a symbol of authority and part of their power to govern the society.[280] Therefore, the state would not tolerate its authority to be challenged in adjudication, and judges are not able to always interpret or apply the law impartially and stand between the government and the people to protect human rights. Law and justice could be comprised for authority by deciding cases in a different way or refuse to file cases at all, e.g. as discussed in the previous chapter, in the poisoned milk powder case, the court would not accept and hear any case presented by the victim's parents until the government set up the compensation guidelines. The strong administrative characteristic of adjudication as a result of the authoritarian rule and the problematic selecting and appointing procedure might lead to a bureaucratic judiciary that is more vulnerable to corruption, which will be developed in the next two chapters. Therefore, the adjudication itself could also become a cause of public discontent for its failure to deliver justice.

Rising caseloads and detached tribunals of the primary courts hearing cases in remote areas in the name of facilitating the people[281] indicate growing usage of the judicial system but does not automatically suggest growing trust of the justice system.

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[279] ibid, p. 480.

[280] Shen Deyong, 'Adjudicative Power is One of the Most Effective Method of Social Management' (司法权是最有效的社会管理手段之一) *Reference For the Party and Political Cadre*, No. 12, 2010, p. 15. (First published in *Legal Daily*, November 11th 2010)

[281] E.g. Xun Mi, 'The Dispatched Tribunal of Fangshan often Hear Cases at Villagers' Home Judges Carry the National Emblem and Climb Mountains to Hear Cases' (房山派出法庭断案常在村民家 爬大山背国徽去开庭) (*People.com*, September 26th 2011) <http://media.people.com.cn/GB/40606/15748549.html> accessed April 29th 2014.

Considering courts of all levels primarily serve as the regime's tool of social governing, this phenomenon could be interpreted as the infiltration of the state power to local areas, the effort to strengthen the regime's control of the people and the state's ability to maintain social order. This could be driven by the state's awareness of and anxiety over the crisis of public support and confidence,[282] especially considering the mass incidents which are getting increasingly serious, which will be further discussed in the next two chapters.

Against the social and political background of China, the public criticizing and developing intense opinions about the justice system is more than a technical jurisprudential issue of judicial impartiality and independence. It reflects a crisis of the perceived legitimacy and public support of the judicial system and the regime. The reaction from the judicial system, e.g. stressing outcome fairness, raising the importance on impartiality, the ongoing judicial reform and attempt to *guide* public opinion suggest their attempts and efforts to allay this crisis.

To establish the appearance of and substantive impartiality are two distinct matters. The development of formalized procedures and the appearance of judicial impartiality could be a strategy of legitimization rather than determination towards the rule of law. For example, in some sensitive cases, the formalized procedure of trial might be employed to construct appearance of impartiality and to cover the defects of the substantive decision; as Pierre Landry argued, that "formal legal institutions are expected to bring legitimacy to decisions that may not be fair or equitable" in an authoritarian regime.[283] This is applicable in China. However, the effect of this legitimatization is open to question. It is a public secret that social activists, political dissents and lawyers who help with the people involved in sensitive cases might suffer from persecution, e.g. the blind Chinese human rights lawyer Chen Guangcheng. Some high profile cases are these kinds of cases, lawyers are under pressure and they might not be able to present arguments which might help with judges' open-mindedness to disputing opinions.

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[282] The chairman and the general secretary of the central committee of CPC Hu Jintao gave a speech on the 90th anniversary of the establishment of CPC. He warned that CPC was facing many new challenges and four dangers, which are "slackness, inadequacy of ability, out of touch with the people, and negative corruption". See Hu Jintao, 'The Speech on the 90th Anniversary of the Establishment of CPC' (*Gov.cn*, July 1st 2011) <http://www.gov.cn/ldhd/2011-07/01/content_1897720.htm> accessed April 29th 2014.
[283] Pierre Landry, 'Institutional Diffusion', p. 207.

However, this problem is unlikely to be solved by simply transplanting the adversarial system where lawyers play a more active role than their peers in the inquisitorial system. Lawyers' ability is different. Good lawyers can increase the possibility of winning, but are expensive. The disadvantaged cannot afford good lawyers to help them while the advantaged can. The outcome could be that the disadvantaged people still cannot receive the justice that they deserve because they cannot afford good lawyers. In contemporary China, a substantial frustration within the public is injustice both in society and in court that the advantaged benefit from while the disadvantaged suffer from, as established in the previous chapter. Simply importing the adversarial system might even fuel the problem rather than fix it, and therefore might not improve public confidence in the justice system.

On the other hand, the state might be aware of the importance of tackling the image of the judicial system which is frustrating to the public. It is not easy to restore an image of fair and impartial judges quickly. Therefore, a strategy of demonstrating and publicizing "judges for people" has been developed. The price is that judges have to bear responsibilities which are irrelevant to their work and this is why they appear to be unprofessional according to the western criteria. In a great number of courts, a heavy caseload has already become a problem for judges.[284] Judges still have to engage in publicizing policies for the government or the CPC, e.g. the birth control policy,[285] help with the people in need,[286] help the government with its work on supporting the poor (*fupin*),[287] and provide legal aid and legal services[288] etc.. However, these efforts could

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[284] For example, in 2010 there are 193,000 judges in China who have deal with 10,999,000 cases. See SPC, 'The Annual Report of the People's Courts (2010)' (*Court.gov*, May 25th 2011) <http://www.court.gov.cn/qwfb/sfsj/201105/t20110525_100996.htm > accessed December 12th 2011.

[285] Lei Jianxiao and Tan Sichao, 'The President of Yongning District Court – Lin Zhongcai Went to a Village which Needs Help and Support for Birth Control and Did Research' (邕宁区林中材院长深入计生帮扶村调研) (*Population and Birth Control Committee of Nanning*, July 20th 2011) <http://sf.nanning.gov.cn/167/2011_8_9/167_345750_1312884306984.html> accessed December 12th 2011.

[286] For example, some judges visited attended children and bring them stationary. See '"Judges Mothers" of the Court of Qian County of Shaanxi Care about Unattended Children' (陕西乾县法院"法官妈妈"情系留守儿童) (*Court.gov*, May 31st 2011) <http://www.court.gov.cn/xwzx/fyxw/dffyxw_1/gdfyxw/sx/201105/t20110531_106583.htm> accessed December 12th 2011.

[287] 'The Judges of the IPC of the City Went to the Countryside to Support the Poor and Show Their Loving Heart' (市中级法院法官下乡扶贫献爱心) (*Meizhou.gov*, July 1st 2010) <http://www.meizhou.gov.cn/zwgk/zwdt/bmdt/sfy/2010-07-01/1277947625d59234.html> accessed December 12th 2011.

distract judges from their work, blur the difference of judges' role from that of other state cadres, and its impact on improving the image of the justice system is uncertain.

Within an authoritarian regime, without an independent and impartial judiciary providing institutional protection of human rights, people could become more sensitive to injustice and sceptical to judicial decisions. From the public's perspective, the public or certain groups of the public want to make their voice heard in some cases and transform the court to be a frontline of resistance to the government and social injustice which the government is responsible for, as established in the previous chapter. In some sense, the strong reaction from the public to the adjudication could be interpreted as an attempt to challenge the authority. The development of the internet facilitates this challenge as it is a sphere of the least restrictions, where it is perceived by the government that "party organizations at the primary level cannot get in, ideological and political work cannot get in, and state force like police force cannot get in".[289] The rise of public opinion on legal issues and cases might also suggest the people's attempt to get more involved in the development of the legal system, as Zhang Weiren argued that in the Chinese legal history the people are just "bit players".[290] This also concerns the public's participation in adjudication, which will be discussed in the next chapter. On the issue of public opinion and adjudication, a court or judge-centred approach is adopted widely within literature where the focus of discussion is how the court or judges should react while still maintaining their impartiality and independence from public pressure, and what could be done to maintain public confidence. This will be discussed in the next part.

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[288] For example, a local IPC has established three volunteering groups gave legal help to women suffering from domestic violence, answer people and local enterprises' questions about law and so forth. 'The IPC of Guyuan of Ningxia has Established Distinctive Groups of Legal Service Volunteers' (宁夏固原中院成立特色法律志愿者服务队) (*Court.gov*, December 9th 2010) <http://www.court.gov.cn/xwzx/fyxw/dffyxw_1/gdfyxw/nx/201012/t20101209_11988.htm> accessed December 12th 2011.

[289] Dai Qun *et al.*, 'Mass Disturbance One Speak out and Millions Support on Internet, Part of the Cadres cannot Adapt to' (群体性事件网上一呼百万应，部分干部不适应) (*People.com*, June 1st 2009) <http://politics.people.com.cn/GB/30178/9389282.html> accessed May 23rd 2014.

[290] Zhang, 'Chinese Legal Culture (Part 1)', p. 829.

2.4 How to Preserve Judicial Impartiality in Public Communication

To maintain impartiality from the influence of public opinion does not automatically suggest judges should ignore the public as the audience of their judgment or isolate them completely from the public. The rule of law indicates that judges should be accountable and impartial in order to maintain public confidence. In the previous chapter, it is established that media especially the tabloids could be biased and misinform the public, which will be further developed in Chapter 5. Therefore, availability and accessibility of reliable information resources become crucial to inform the public about the law and the justice system to maintain public confidence. Communication between the court and the public could inform the public as the official and reliable information resources instead of the media especially the tabloids, and therefore could deliver a more objective and accurate image of the judiciary and the justice system and maintain public confidence rather than the opposite, provided that the actual situation of judicial impartiality and other aspects of the justice system are not as negative as presented in the media coverage. This part will discuss what kind of public communication could effectively inform the public and at the same time is unlikely to compromise impartiality of judges.

2.4.1 Judgements Should Be Well-Reasoned and Accessible to the General Public

As the actual reasoning process in judges' mind is inaccessible, the reasoning of their judgments is the most relevant and reliable material/evidence of whether the decision-making is impartial. Therefore, it is crucial to give a well-reasoned judgment to make it evident that actual impartiality has been upheld and maintain the appearance of impartiality.[291] The process of fully arguing the decision could also help judges to check whether there is any partiality or illegitimate influence which might jeopardize judicial impartiality that is involved in their decision making or whether they have ignored anything relevant and accurate. Reasoning could be a constraint on potential arbitrariness

[291] Wendel goes even further. He argues that "the requirement that judges give reasons for their decisions is a sufficient guarantee of impartiality". See W. Bradley Wendel, 'Impartiality in Judicial Ethics: a Jurisprudential Analysis', *Notre Dame Journal of Law, Ethics and Public Policy*, Vol. 22, 2008, p. 323. This thesis would suggest effective rather than a definite guarantee.

and partiality to maintain judicial impartiality and accountability. Therefore, this thesis argues that judgments should be well reasoned and accessible to the general public to preserve the reality and the appearance of judicial impartiality. Also, this thesis argues that a well reasoned judgment does not necessarily indicate it must be long or even tedious, as the length depends on the complexity of the case, although it might be difficult to expect the judgments of routine or simple cases to have very detailed reasoning as the justice system also has to maintain efficiency, especially when the caseload is very heavy. In common law systems, the routine and uncontroversial appeal cases and the cases of first instance normally will publish written opinions to give reasons of the decisions.[292] In those controversial cases and high profile cases, it is necessary to have the decision fully reasoned to inform the public how this decision has been made, as the decision might also affect interests of the general public besides the parties involved in the case. The cases of this kind only take a small percentage of the caseload and thus is unlikely to affect the efficiency significantly.

An accessible and well reasoned judgment could provide the public with more accurate information compared with the media, and therefore can help to persuade the audience including the public about the impartiality of the decision making and the soundness of the decision. The process of constructing arguments to persuade the audience could also be a process for judges to persuade themselves that the decision that they are going to make serves justice best. However, this thesis does not conclude that every well argued decision can convince the entire public. A well reasoned judgment might still cause disagreement or even intense criticism. This thesis agrees with W. Bradley Wendel's argument, that it is important to bear in mind that a judge is not under obligation to persuade everyone of the public that his or her decision is the only substantially right decision.[293] A judge's obligation is to reach a plausible and sound decision which is the best one in accordance with the facts and law to his or her conviction rather than everyone else's conviction and to justify this decision in his or her judgment. Therefore, a judgment could be but does not have to be persuasive to everyone, and any member of the public does not have a right against judges to persuade them that a particular judicial decision is the only right one. It is unjustifiable if judges give a vague

[292] ibid, p. 321.
[293] ibid.

reasoning merely to avoid scrutiny from the public, because to persuade the public better is an explanation of a possible positive impact of a well reasoned judicial approach rather than a justification. The justification of this approach is: the public have a right to know and to preserve and demonstrate judicial impartiality and this calls for a well reasoned judicial approach.

A counter argument of this thesis's argument might be that not every country's judges give detailed reasoning in their judgments even in the most important cases, e.g. the reasoning of the judgments of French Supreme Court are very concise. From French judges' perspective, "the role of the opinion is to apply settled law to the facts, or rather, to create the appearance that the court is merely applying law to fact", which is the appearance of judicial impartiality.[294] This very much summarized and concise reasoning style does not conclude an adverse impact on the legal system. It might be because the French academics will "perform the reason-giving function assigned to judges in common law systems".[295] However, the response of this thesis is that academics' interpretation is their speculation of the judges' reasoning and cannot replace judges' reasoning to evidence judicial impartiality; therefore academic explanations cannot constitute a substitute of judges' own reasoning. An over-concise and even misleading reasoning style could cause problems of justification. Even if French judges attempt to maintain the image of a strict deductive judicial reasoning, the fact is: French law is not free from any ambiguity and to decide cases judges have to go beyond this mechanical application, and French scholars and even some judges admit that there is the creative role of French judges behind this mechanical and concise judicial reasoning style.[296] French judges try to maintain judicial legitimacy through their approach while American judges use judicial opinions to justify creative decisions as "a legitimate exercise of judicial power".[297] This approach also has critics for its "inaccessibility, lack of candor and absence of policy discussion".[298] However, Schroeder is concerned about "open debate of these matters

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[294] Pierre Mimin, *Le Style Des Jugements* (4th edition, Librairies techniques 1978), cited by Michael Wells, 'French and American Judicial Opinions', *Yale Journal of International Law*, Vol. 19, 1994, p. 92.
[295] Wendel, 'Impartiality in Judicial Ethics', p. 321-322.
[296] Sadok Belaid and Michel Villey, *Essai Sur Le Pouvoir Createur Et Normatif Du Juge* (Librairie générale de droit et de jurisprudence 1974) cited by Wells, 'Judicial Opinions', p. 99.
[297] Wells, 'Judicial Opinions', p. 90.
[298] Francois Michel Schroeder, *Le Nouveau Style Judiciaire* (Dalloz 1978) cited by Wells, 'Judicial Opinions', p. 100.

would politicize decision making and make case resolution more difficult".[299] The problem of this argument is: it overturns the causation. As a result of the absence of detailed reasoning, the judicial decision making with limited constraints could already be politicized; while more detailed reasoning could minimize judicial decision making from getting over-politicized and biased. This argument could be exemplified by China's problems, which will be developed in Chapter 4 when discussing open justice. The very concise reasoning approach of French judges has also been challenged in the European Court of Human Rights (ECHR). In *Higgins and Others v. France*, the court argued that Article 6(1) of ECHR "obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument" and the extent must be "in the light of the circumstances of the case".[300] In this case, it held that the Court of Cassation's judgment failed to give sufficient explanations to applicants, and therefore was a violation of Article 6(1) of ECHR.[301]

In mainland China, the judgments including the judgments of high profile cases are not always accessible, and therefore they cannot inform the public and evidence an impartial judicial decision making process. Even if the judgments are accessible, the reasoning style of Chinese judges is too concise to find out how the judge or the panel reached the decision, because the typical structure of a judgment is just a restatement of the fact the court found or held and citations of law without detailed reasoning and followed by the decision at the end.[302] Chinese scholars have been arguing that judgments should be well reasoned but this idea has been resisted by judges.[303] An explanation might be that the modern Chinese judicial system is influenced by the civil law systems and judges tend to stick to the conventional idea of a deductive judicial process and strict application of law and therefore the law cited is adequate to state the reason of the decision.

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[299] Von Mehren and Gordley, *The Civil Law System* (2nd edition, Little Brown 1977) cited by Wells, 'Judicial Opinions', p. 102.
[300] *Higgins and Others v France* (1999) 27 EHRR 703, paragraph 42.
[301] ibid, paragraph 43.
[302] He Liangbin, 'On Reasoning of Judgments' (论判决理由), *The People's Judicature*, No. 12, 1999, p. 28-30; Fang Jie, 'Judgements should State Reasons' (判决书应当陈述理由), *Studies in Law and Business*, No. 4, 2001, p. 116-121.
[303] ibid.

It is true that China is influenced heavily by civil law systems but such an explanation is limited. This thesis argues that two reasons for the judges' resistance are: 1) the heavy and rising caseload (not in every court); and 2) judges might be concerned that the more detailed the reasoning is, the more likely errors and partiality or anything else which might cause controversy and criticism will be exposed.[304] Especially the latter could explain why in high profile cases the judgments are not always accessible or not well reasoned. Chinese judges' concerns are not groundless because of the problematic system which holds judges accountable for their errors, and high profile cases are also more likely to draw attention from the judicial authority or the CPC leaders, which will be developed in Chapter 3 when discussing judicial independence in China. This suggests that Chinese judges still attempt to maintain an image of a good and impartial judiciary regardless of the reality. Even though the public confidence of judicial impartiality in China is problematic, if the public have limited information about how grave the reality is, it could provide an opportunity to the authority to arrange or construct counter explanations or statistics to respond to the doubts raised by the public and attempt to persuade the public the reality is not as grave as they think. This is just a negative example of how important a well reasoned judicial style is to minimize judicial partiality and unconstrained discretion. This thesis does not argue that Chinese judges should adopt a new reasoning style in order to demonstrate to the public how partial they are, but to discipline themselves and improve their impartiality.

A counter argument might be: after high profile cases are closed in China, sometimes there are interviews with the judges who decide the case, press conference held by the court or any different kind of communication with the public to inform the public about the reason for the decision, and judges could be more responsive to the doubts of the public by such method, and therefore under this circumstance judges do not have to give a well argued judgment. This argument will be critically analysed in the next section regarding the necessary communication of the judiciary with the public.

[304] Liang Huixing, 'The Speech at the Adjudication Methodology Conference of the Intermediate Court of Xi'an (Expert Comment)' (在西安中级法院裁判的方法研讨会上的发言（专家点评）) (*Iolaw.org.cn*, 2006) <https://www.iolaw.org.cn/showarticle.asp?id=1651> accessed March 7th 2014.

2.4.2 Managing Communication with the Public: Silence v. a More Proactive Approach

Judicial reasoning is a process of duly considering and weighing different opinions and achieving a sound decision, and a well reasoned judgment could evidence this weighting process.

> This realisation may itself contribute to a belief in tolerance: a realisation that our own conclusions have been reached by a process of weighing conflicting considerations in an often uncertain balance may help to sustain our respect for those with whom we disagree.[305]

Therefore, it will contribute to public confidence in the judicial system.

As established in the previous chapter, in high profile cases in mainland China, after the cases are closed, the judge might accept an interview with journalists, or write a letter to a certain media outlet to "explain" why this particular decision had been made, or the court will hold a press conference to inform the public. The aim of such activities is to defend the decision from the (potential) criticism of the public more than merely explanation. Two types of public criticism are distinguished: the reasonable doubt or criticism of a failure of judicial impartiality and criticism of the substantive content of a decision. With regard to the first type of criticism, this thesis argues that public confidence of judicial impartiality is fundamentally established by what judges have done in the courtroom and how judges achieved their decisions which are evident by the reasoning in their judgments. If they fail to be impartial or avoid inviting reasonable doubt about their impartiality, the damage to public confidence is already done and subsequent explanation does not necessarily compensate it. With regard to the second type of public criticism, given the fact that the reasoning of the judgment by Chinese judges is too concise to elaborate how judges achieved the particular decision, and the accessibility of judgments is still problematic, is it justifiable to use this kind of explanation through news media to replace an accessible and well reasoned judgment? The answer of this thesis is no. As *The Commentary on the Bangalore Principles of Judicial Conduct* states:

> If after the conclusion of a case, the judge receives letters or other forms of communication from disappointed litigants or others, criticizing the decision or decisions made by colleagues, the judge

[305] N. E. Simmonds, *Central Issues in Jurisprudence Justice, Law and Rights* (2nd edn, Sweet & Maxwell 2002) p. 13.

> should not enter into contentious correspondence with the authors of such communications...If the media or interested members of the public criticise a decision, the judge should refrain from answering such criticism by writing to the press or making incidental comments about such criticism when sitting on the bench. A judge should speak only through his or her reasons for judgments in dealing with cases being decided. It is generally inappropriate for a judge to defend judicial reasons publicly.[306]

Thus, what Chinese judges have done to defend their decisions after the trial, e.g. trial judges speak out in a press conference, is in contradiction to some well received professional ethic code. Chinese judges are not the only judiciary receiving public criticism for some of their decisions. How to deal with public criticism and the potential damage to public confidence is a question that many jurisdictions have confronted. *Guide to Judicial Conduct (2009)*, which is issued by the Supreme Court of the UK, also stressed the point that "the Justices must be immune to the effects of publicity, whether favourable or unfavourable".[307]

This thesis agrees that judges should only justify their decisions in their judgments, and argues that if judges defend their decisions or makes comment on a particular pending or closed case publicly, it could compromise their impartiality, as Lord Kilmuir asserted "so long as a judge keeps silent his reputation for wisdom and impartiality remains unassailable".[308] This is because: firstly, when judges give reasons of decisions in their judgments, their justification is already open to the public[309] and therefore a re-justification is not necessary; secondly, if judges defend their decisions publicly in response to a certain criticism, they might re-justify or add or amend reasons for their decisions, and therefore public discussion "risks the appearance of extraneous considerations becoming involved and may obfuscate of the judicial reasoning

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[306] UNODC, 'Commentary', paragraph 73-74, p. 66.
[307] United Kingdom Supreme Court, 'Guide to Judicial Conduct (2009)' (*Supreme Court*, 2009) <http://www.supremecourt.uk/docs/guide-to-judicial_conduct.pdf> accessed April 29th 2014, paragraph 2.4.
[308] Letter from Lord Kilmuir to Sir Ian Jacob K.B.E. of December 12th 1955, reprinted in Barnett *Judges and the media – the Kilmuir Rules* (1986), p. 384-385; cited by Lord Neuberger of Abbotsbury, 'Where Angels Fear to Tread Holdsworth Club 2012 Presidential Address' (*Judiciary.gov.uk*, March 2nd 2012) <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-holdsworth-lecture-2012.pdf> accessed March 20th 2014.
[309] Sir Daryl Dawson, 'Judges and the Media', *University of New South Wales Law Journal*, Vol. 10, 1987, p. 17.

process";[310] thirdly, when the public is split into different opinions, if judges respond to a particular opinion, it might cause more controversy and judges might compromise the appearance of their impartiality if they get involved into public controversy; fourthly, in interviews or press conferences, the media will unavoidably tend to personalise issues which is against an objective approach to the administration of justice.[311] Therefore, judges are likely to compromise their impartiality by defending a certain decision against public criticism publicly and they must not do this. This is also a general rule for English[312] and Australian judges[313].

However, that judges should not be influenced by public opinion does not suggest that they should completely ignore public opinion. The *Guide to Judicial Conduct (2009)* also acknowledges that judges should take regard to "the profound effect which their decisions are likely to have... upon the wider public whose concerns may well be forcibly expressed in the media".[314] To be more specific, in some high profile cases, in order to minimize misunderstanding of the public, the court might draft a media release to accompany their judgment, e.g. the Charlotte Wyatt case[315] "has received a great deal of media attention, and the court thinks it very important that the public should understand both what the case is about, and what it is not about", a press release has been issued.[316] In New Zealand, in the cases of public interest, the Supreme Court, Court of Appeal, or High Court would also issue media release with some judgments,[317] and indicate that "this summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment and the full judgment with reasons is the only authoritative document."[318] This thesis argues that occasional media release, e.g. a

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[310] Justice Margaret McMurdo, 'Should Judges Speak Out?' (Judicial Conference of Australia, Uluru, April 2001) <http://www.jca.asn.au/attachments/mcmurdo.pdf> accessed February 8th 2012, p. 8.
[311] Dawson, 'Judges and the Media', p. 18.
[312] "The justices... will show appropriate caution and restraint when explaining or commenting publicly upon their decisions in individual cases." United Kingdom Supreme Court, 'Guide to Judicial Conduct (2009)', paragraph 2.5.
[313] McMurdo, 'Speak Out'.
[314] United Kingdom Supreme Court, 'Guide to Judicial Conduct (2009)', paragraph 2.4.
[315] Charlotte Wyatt was born with serious disability, and her life is dependent on care and treatment. The case is about whether it is in Charlotte Wyatt's best interest to revive her if she stops breathing.
[316] Judicial Communications Office, 'News Release Charlott-Ruling/05' (*Judiciary*, July 12th 2005) <http://www.judiciary.gov.uk/media/media-releases/2005/charlotte-ruling05> accessed on February 8th 2012.
[317] 'Judicial Decisions of Public Interest' (*Court of New Zealand,* NA) <http://www.courtsofnz.govt.nz/from/decisions/judgments> accessed on February 8th 2012.
[318] For example, media release with [2011] NZSC 138, November 17th 2011.

summary of a judgment, and publishing a judgment or a sentencing remark in a prompt and timely manner could inform the public better and minimize misunderstanding which might be caused by media coverage.

However, misreporting by the media occurs and might cause public misunderstanding and criticism, especially the tabloids tend to drive public controversy and judges might become fair game. As a result, both judges' reputation and public confidence in the judicial system might suffer. Judges suffering from public criticism is a prevalent problem.[319] Conventionally, judges are aloof from the media and public criticism, and their reaction to criticism is silence. This silent approach has been reviewed in many countries and a more proactive approach has been proposed and adopted to deal with the (potential) crisis of the reputation of the judiciary. Another context is that "increased public awareness of the vulnerability and fallibility of the legal process, acutely brought to the fore when miscarriages of justice arise, cannot be entirely addressed by improving public understanding."[320] Therefore, "judges now have to earn respect" "in a critical public sphere".[321]

Under such circumstances, cautious communication by the judicial system with the public and media becomes needed. However, a question for a proactive approach is: how to improve public understanding and confidence without compromising judicial impartiality and judicial independence? Sir Igor Judge expressed this concern that "enhancing public confidence is a most difficult concept and it is particularly difficult... for judges who actually are not in the business of trying to sell themselves to anyone". [322] Also, judges might have a heavy workload and they are not trained about public communication,[323] and therefore judges need institutional support from the judicial system. However, such institutional support must not "seek to justify decisions as opposed

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[319] Michael Kirby, 'Attacks on Judges a Universal Phenomenon', *Judicature*, Vol. 81, No. 4, 1998, p. 150.
[320] Lieve Gies, 'The Empire Strikes Back: Press Judges and Communication Advisers in Dutch Courts', J*ournal of Law and Society*, Vol. 32, No. 3, 2005, p. 455.
[321] ibid, p. 469.
[322] Q. 235, Examination of Witnesses, Minutes of Evidence, House of Lords Select Committee on Constitution (*Parliament of UK*, February 21st 2007) <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/7022103.htm> accessed February 8th 2012.
[323] McMurdo, 'Speak Out', p. 6.

to explaining them" under any circumstances,[324] as "to add any explanation or qualification would undermine the completeness and finality of a ruling".[325]

In England and Wales, judges used to rely on the press office of the Lord Chancellor's Department to deal with the communication with media or the public. In 2005, a separate communication office, the Judicial Communications Office (JCO), was established to provide communication support for all the judges in order to enhance public confidence towards the judiciary. After a particular judgment is announced, if there is an outstanding misunderstanding which might be caused by the media's misreporting or misinterpretation, it is generally regarded to be inappropriate for judges to stand up to defend their decisions from public criticisms.[326] Rather, "the matter will be handled by the Court's communications officer in consultation with the Justice",[327] e.g. in *Statement in response to press reporting of Judge Tabor* by the Judicial Communications Office, it explains why the witness's identification of the offender was not reliable.[328]

England and Wales is not the isolated example of such a pro-active approach. This kind of institutional support was established even earlier in the Netherlands. Over thirty years ago, press magistrates and judges and communication advisers were established in the Dutch courts. Press judges, who "act as spokespersons on behalf of the courts", are also members of the judiciary.[329] They will "step into the media limelight to explain matters of court policy and individual judgments",[330] while communication advisers "work behind the scenes".[331] Dutch press judges and communication advisers are also only "neutral messengers".[332]

In Puerto Rico, according to the judicial ethics code, judges must keep "the dignity of silence" and should not defend their decisions publicly. A press office is established to

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[324] Lords Select Committee on Constitution, 'Constitution-Sixth Report', paragraph 171.
[325] Gies, 'Press Judges', p. 469.
[326] Judges' Council of England and Wales, 'Guide to Judicial Conduct' (*Judiciary*, August 2011) <http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/guide-judicial-conduct-aug2011.pdf> accessed April 29th 2014, paragraph 8.1.1.
[327] United Kingdom Supreme Court, 'Guide to Judicial Conduct (2009)', paragraph 2.6.
[328] Judicial Communications Office, 'Statement in Response to Press Reporting of Judge Tabor' (*Judiciary*, January 14th 2009) <http://www.judiciary.gov.uk/media/media-releases/2009/statement-judge-tabor> accessed February 8th 2012.
[329] Gies, 'Press Judges', p. 451.
[330] ibid, p. 468.
[331] ibid, p. 467.
[332] ibid, p. 452.

provide institutional support. The press office may even held a press conference if necessary. The support has reduced criticisms most of the time.[333]

However, the ideal of a proactive approach carried out by "neutral messengers" is not free from questioning. A concern is: however neutral the messengers are, building an image of impartiality and detachedness is unavoidable,[334] and the proactive approach "may make journalists over-dependent on court sources, discourage independent reporting, and even stifle legitimate criticism of courts".[335] This concern also applies to a court dominated manipulation of information which could affect public opinion. This thesis argues that to defend a judicial decision by arguing with the media or any members of the public is actually intentionally influencing the media, which might erode the media's independence; however, informing the media by issuing a media release is unlikely to invade the media's freedom, if it just constitutes one more reliable and accurate information resources to the media without restrictions on the media's access to other information resources or their freedom to provide their own investigative reporting. It could help the media to check whether there is any descriptive content conflicting with the media release. It is still for the media to decide what may constitute a complete story in their reporting, which suggests there might be something accurate but the court does not consider as legally relevant but the media may consider it an indispensible part of the story, as not every detail of a case is legally relevant.

Judges decide cases but not what counts as a "legitimate and complete understanding"[336] for the media or the public. (The court may decide what cannot be reported due to the protection of privacy or in the interests of justice, however, the aim of such restrictions on reporting does not constitute attempts to shape public opinion.) A possible result is more relevant (not necessarily legally relevant) and accurate information of a case might be disclosed to the public. If the court attempts to dominate the media or the public's commentating on a decision, it would infringe the freedom of thought and expression. This thesis argues that to be proactive does not suggest that the court should

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[333] Mirelsa Modestti Gonzalez, 'Judicial Family Support Program a New Judge in the Family: Challenges for the Spouse and Children' (*The Judicial Branch of Puerto Rico*, November 2006) <http://www.ramajudicial.pr/PAFRJ/pdf/Articulos/A-new-Judge-in-the-Family.pdf> accessed December 13th 2011.
[334] Gies, 'Press Judges', p. 465.
[335] ibid, p. 457.
[336] ibid, p. 456.

be dominant when dealing with its relationship with the media and the public, as there is a boundary between disclosing information and information manipulation. The tension between the judiciary and the media/public opinion could be caused by the attempt and effort of each side to influence the other side, and as a result each side might develop anxiety about a potential invasion of their own independence. As Lord Judge (the recently retired Lord Chief Justice of England and Wales) asserted

> The most emphatic feature of the relationship between the judiciary and the media is that the independence of the judiciary and the independence of the media are both fundamental to the continued exercise, and indeed the survival of the liberties… As far as I can discover, there never has been, and there is no community in the world in which an independent press flourishes while the judiciary is subservient to the executive or government, or where an independent judiciary is allowed to perform its true constitutional function while, at the same time, the press is fettered by the executive.[337]

Public confidence itself is a political term more than a legal term. If priority of judges' work is given to public confidence instead of deciding a case in the light of the law and evidence, it might cause anxiety to the judiciary and their overreaction to public criticism. Public confidence in the judiciary is not as simple as judging whether judges are good or bad, because judging judges by their public reputation or public comments is likely to result in manipulation of judges by the comment makers – the public.[338] Public confidence, as argued in this thesis, is about the impartiality, independence and integrity of the judiciary, rather than whether their judgments achieve everyone's satisfaction.

The establishment and development of institutional support for judges in these countries which have been discussed previously also reflects that the concern about judges' reputation and public confidence is growing. This thesis argues that judges need to develop a thick skin when confronting criticism, and they should avoid creating an image of their anxiety to criticism. If there is any personal bitterness caused by criticism, judges should keep it to themselves. Where the rule of law is established, what judges can do to maintain public confidence is to work in good faith rather than to work on strategies

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[337] Lord Judge, 'The Judiciary and the Media' (*Bfhu.org*, March 28th 2011) <http://www.bfhu.org/images/download/lcj-speech-judiciary-and-the-media.pdf> accessed April 29th 2014.
[338] This argument is inspired by "the common, informal practice of judging judges on the basis of general 'reputation' within the bar or among other judges may inadequate, fraught with misunderstanding, and subject to manipulation by judges or by those who comment on the work of judges, among others". See

regarding public opinion instead. However, China has adopted a different approach to deal with public opinion and public confidence, which will be developed in the following chapters.

Conclusion

This chapter has established the definition of judicial impartiality by consulting western literature. Judicial impartiality studied by this thesis is concerned about the impartiality of the judicial decision making process. An impartial judicial decision making process should be free from bias and prejudice; and the judge should keep an open mind and consider all the relevant and accurate factors. Judicial impartiality is both a matter of fact and appearance. The appearance is no less important than the actuality. Judges should act in good faith to avoid reasonable doubts about their impartiality inside and outside the courtroom, and maintain public confidence on the judiciary. The criterion of a reasonable doubt is measured by a well-informed, fair minded and reasonable person, and therefore the perception of an interested party or the public might not be decisive.

The public might be ill informed under the influence of the media and therefore public opinion might be skewed. Public opinion is not legally relevant to decide a case. Therefore, if judges make a decision according to any opinion from the public or merely to avoid public criticism, it would undermine judicial impartiality and independence, which would eventually undermine public confidence in the judiciary.

China has its own legal tradition and its distinctive legal, cultural, social and political context. Judicial impartiality has a different substance from the West, although judicial impartiality is also a well accepted value in China. Chinese judges have to be open minded to what might appear to be legally irrelevant to their western peers, e.g. *qing li*, in order to solve a dispute and maintain public confidence. Public opinion, which might reflect the variable values and *qing li* of different local communities in a country such as China of great diversity, therefore cannot be completely regarded to be in contradiction to judicial impartiality in China's context. However, this is different from judges simply deciding a case primarily by their perception of public opinion, which this thesis argues would jeopardize the rule of law. The relationship between public opinion and judicial

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Marin K. Levy, Kate Stith and Jose A. Cabranes, 'The Cost of Judging Judges by the Numbers', *Yale Law*

impartiality becomes a complex issue, as it is in contradiction to the modern perceptions of the rule of law which has growing influence in China especially in the Chinese scholarship. This raises the issue of what counts as public opinion in China's context, which will be developed in Chapter 4 when discussing open justice in China and Chapter 5 when discussing the censorship of the media and the internet and its influence on public opinion, so as to argue that public opinion is also subject to influence and could be moulded by censorship of information and other methods in an authoritarian regime, which constitutes one of the reasons why deciding a case according to the perceived public opinion is in contradiction to the rule of law in the particular context of China, as it might make the state power even more penetrative to the justice system. This is to provide further support of this thesis argument that it would undermine the rule of law if public opinion becomes the ground of a judicial decision, as it would be problematic to argue about public opinion and judicial impartiality without defining what either one of them is.

However, even in a jurisdiction where public confidence of the judiciary is problematic, which mirrors the failure of the judiciary to be independent, impartial, competent or free from corruption; public scrutiny might help to reduce unfairness in judicial process. However, this cannot justify that public opinion is the legitimate substitute of an independent and impartial judiciary. Rather, the measure is to improve the quality of the judiciary.

Public criticism on the judiciary and their decisions is a prevalent problem even in the more developed legal systems. In order to inform the parties and the public better and reduce misunderstanding, judgements should be well reasoned and accessible to the public. The importance of good reasoning and accessibility of judgments also highlights that judges should justify their decisions only in their judgments. It is generally accepted that a judge should not defend his or her decision publicly or make comments on a particular pending or completed case publicly. When there is serious misreporting or misunderstanding, in order to preserve judges' reputation and public confidence, there should be institutional support for public communication. Such institutional support may disclose relevant information and clear misunderstanding, but it must not justify a particular decision. Under whatever circumstances, public communication must not compromise judicial impartiality and independence.

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and Policy Review, Vol. 28, No. 2, 2010, p. 323.

To give a more comprehensive answer to the research question of this thesis, there are some relevant issues need to be analysed. The first one is to protect judicial impartiality from the influence of public opinion, the independence of the judiciary is of vital importance, then how to comment on the public's participation in adjudication e.g. jury system in common law and lay assessor system in China and other inquisitorial systems, and if the public's participation in adjudication can be justified, whether the public's right has been exhausted in jury trial or lay assessor's participation. This question will be discussed in the context of criminal justice in Chapter 3 and further discussed from a comparative perspective in Chapter 6. The second issue raised by this chapter is if the public could be biased due to the influence of media, how to defend the principle of open justice and public scrutiny, which will be discussed in Chapter 4. The media's influence on the relationship between public opinion and judicial decision making raised in this chapter will be discussed in Chapter 5.

CHAPTER THREE

JUDICIAL INDEPENDENCE AND PUBLIC PARTICIPATION IN THE JUSTICE SYSTEM IN CONTEXT: A CRITICAL ANALYSIS OF THE PERFORMANCE OF THE CHINESE JUDICIARY AND PUBLIC CONFIDENCE

Introduction

In the previous chapter, it is established that public opinion might compromise judicial impartiality although it is a more complex issue in the context of China. It is also discussed how to preserve public confidence without jeopardising judicial impartiality in public communication, under the premise that the judiciary is independent and impartial. However, the Chinese judiciary still has problems of independence, which has seriously compromised their impartiality, even according to the criteria of China as discussed in the previous chapter. This chapter will further critically analyse the situation of judicial independence and its impact on the performance of the justice system and public confidence in China. As discussed in the first chapter, intense public opinion or public discontent triggered by high profile cases suggests a problem of public confidence in the justice system. Therefore, only relying on the tactics of public communication is unlikely to solve this problem. Under such circumstances, there are two options available for the state to deal with the problem of public confidence: improving the judicial system, e.g. establishing an independent judiciary; or constructing a deceitful image to the public.

To discover the truth behind the measures of the state, the first part of this chapter will discuss the substance of the term "judicial independence" used in the context of China. The constitutional gap of judicial independence and several relevant contentious

institutions will be discussed, as well as the problems in practice. By doing so, this part attempts to discover if there is any risk to judicial independence and impartiality no less serious than public opinion. If it could be established that an independent judiciary could lead to better and impartial performance of the judiciary, it could be expected that the measures taken to improve judicial independence could improve public confidence in the justice system.

However, to allay the crisis of public confidence, the state focuses on promoting public participation as a symbol of the appearance of legitimacy and democratic values in the justice system rather than improving judicial independence, which will be developed in the second part of this chapter. The second part attempts to critically analyse whether or not public participation could improve the performance of the justice system and consequentially public confidence in the justice system. The only institution of public participation in adjudication provided by Chinese law is the People's Assessors' system, which is also regarded to be an institutional channel of public opinion; however, this system deviates from its original aims provided in the law and the state ideology and is under criticism for a number of practical problems which will be discussed. Under these circumstances, an experiment of the People's Jury is suggested by a number of scholars and introduced by several courts. This experiment will be critically analysed against this background and the expectation of the judicial authority, i.e. improvement of public participation, acceptability of the judicial decisions and public confidence, in order to provide a more in-depth understanding of public opinion and judicial decision making in China.

It is established in the first chapter that the public opinion's influence on judicial decision making is not direct in China, and the dynamics are usually that a case has caused intense public attention and has subsequently raised concerns for the government or CPC leaders, who therefore intervene in the case to appease the public. It is also established in the previous chapter that Chinese judges are concerned about public opinion and how their judgments would be received by the public. However, why? With regard to improving acceptability of judgments and public confidence, an important criterion the Chinese courts might refer to is reduction of petitions against judgments or courts. The problems of social unrest such as petitions and mass incidents are an important social

context to understand the concern of courts and the state about public opinion in China, which will be discussed in the third part of this chapter.

3.1 Judicial Independence and Public Confidence in the Judicial System

Judicial independence is a widely accepted value, as acknowledged in *The Universal Declaration of Human Rights*[339] and other international treaties, and enshrined in the constitution of many states including China. It is widely accepted as a prerequisite for the rule of law but it is not established for its own sake. Rather, it is to preserve judicial impartiality and the parties' rights to a fair trial from any extra-legal pressure and influence alongside with judicial accountability, and therefore it could maintain public confidence in and support of the judicial system. This part will analyse the subtle relationship between judicial independence, public confidence and public opinion in the first section and critically analyse judicial independence in China's context in the second section.

3.1.1 Judicial Independence and Public Confidence

Before developing any further analysis of the situation of judicial independence in China in the next section, this section will establish what "judicial independence" in this thesis refers to at the beginning. Judicial independence includes both institutional independence and the individual judges' independence. The court and judges have exclusive authority and liberty to decide the cases presented to them according to law. The judicial decision making process is free from the external pressure, e.g. pressure from the government, parliament, the party in power or any social groups, and the pressure from inside of the judicial system other than the appeal process, e.g. a judge of higher level. Independence of individual judges is generally protected by security of tenure and financial security.[340]

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[339] Article 10, The Universal Declaration of Human Rights.

[340] United Nations Office on Drugs and Crime (UNODC), 'Commentary on the Bangalore Principles of Judicial Conduct' September 2007, paragraph 26, p. 41.

Also, judicial independence includes not only the importance of actual judicial independence but its appearance to the public.[341] This is crucial to maintain public confidence in the judicial system. With regard to the potential influence of public opinion on the judiciary, "if they lack institutional legitimacy, courts do not have enough leeway to decide against public opinion where necessary."[342] Therefore, judges should be encouraged to promote public awareness of judicial independence "in view of the public's own interest", as the public might have misunderstanding that judicial independence is established for "protecting judges from review of and public debate concerning their actions".[343]

This thesis argues that public awareness of judicial independence should be promoted in China, however, it doubts whether this "misunderstanding" on the part of the public is completely groundless. It would be a concern if a corrupt and incompetent judiciary becomes independent and has exclusive authority, as this principle could be abused where accountability is doubtful. If a judiciary becomes immune from the pressure of the public without transparency of the legal procedure and accountability of the judiciary, the current problems e.g. corruption within the judiciary (which will be developed later in this section) and the crisis of public confidence might become even more grave. Consequentially, it might also increase the difficulty to invite public support for the improvement of judicial independence. As Abrahamson argued, "when the public does not have confidence in the judicial system… the public views a judge's independence as the problem, not the solution".[344] Therefore, improvement of the independence of judiciary cannot be isolated from improvement of their quality and performance.

As established in the previous chapter (2.3), so far the Chinese public lacks confidence in the judiciary. However, a lack of judicial independence is only one of the many causes. In fact, it is also doubtful that whether a lack of judicial independence is the major reason of the crisis of public confidence. Other problems which also erode public confidence will be given as the following.

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[341] UNODC, 'Commentary', paragraph 37, p. 47.
[342] Marc Bühlmann and Ruth Kunz, 'Confidence in the Judiciary: Comparing the Independence and Legitimacy of Judicial Systems', *West European Politics*, Vol. 34, No. 2, 2011, p. 320.
[343] UNODC, 'Commentary', paragraph 44, p. 52.

First, both outright corruption within the Chinese judiciary, e.g. taking bribes, and doing favours for connections (*guanxi*), visibly exist “at almost all levels of the judicial system, involving all types of judges”, based on media coverage on cases of judicial corruption.[345] This suggests that this problem is also made known to the Chinese public through media coverage and so damage to the image of the Chinese judiciary could be expected. Hualing Fu argues that corruption is what is responsible for the damaged reputation of Chinese judiciary; however, corruption is becoming more sophisticated and less visible e.g. a judge might ask one of the parties to contact a particular lawyer to negotiate between them and coach this lawyer subsequently on evidence and arguments.[346]

Second, unequal treatment, e.g. if a litigant or lawyer has connections with staff in the courts or “a judge mate”, “the registration procedure can be surprisingly smooth and efficient”.[347]

Third, judges’ behaviour which breaches the discipline of the court, e.g. smoking or answering telephone calls during trial, arriving at a trial late or leaving early and so forth.[348]

Fourth, problems of the qualification and quality of Chinese judges in some areas, e.g. some courts suffer from insufficient funding and therefore are reluctant to recruit new judges, however, some people with no legal training background but with “a very firm connection” can manage to become judges and then behave corruptly; while some of the very able judges have left for a better paid job.[349]

Fifth, uneven competence among Chinese judges: as Hualing Fu summarized, “it remains the case in the Chinese courts that the most qualified judges – those with legal education – work at a junior level in the courts; those with fewer qualifications occupy

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[344] Shirley S. Abrahamson, ‘Courtroom with a View: Building Judicial Independence with Public Participation’, *Williamette Journal of International Law & Dispute Resolution*, Vol. 8, Iss. 13, 2000, p. 24.
[345] Ling Li, ‘Corruption in China’s Courts’ in Randall Peerenboom (eds), *Judicial Independence in China Lessons for Global Rule of Law Promotion* (Cambridge University Press 2010) p. 196-220.
[346] Hualing Fu, ‘Putting China’s Judiciary into Perspective: Is It Independent, Competent, and Fair?’ in Erik G. Jensen and Thomas C. Heller (eds), *Beyond Common Knowledge Empirical Approaches to the Rule of Law* (Stanford University Press 2003) p. 211-212.
[347] Li, ‘Corruption in China’s Courts’, p. 213.
[348] Fang Le, ‘Robes and Judicial Mallets: The Practical Results of Symbol Reforms – A Survey of 386 Judges and 473 Citizens of Jiang Su Province’ (法袍与法槌：符号改革的实际效果——来自江苏省 386 名法官与 473 名市民的调查), *Law and Social Science*, Vol. 1, 2006, p. 89.

more-senior positions; and those with no legal qualifications become court presidents or their deputies";[350] this is because "the competence of the presidents of the courts is determined by their political skill and connections, not their legal learning".[351]

Sixth, ill operation of some Chinese courts, e.g. steep increasing of litigation fees.[352]

Before making a decision whether or not to go to court, the potential litigants would try to know something about the court.[353] Litigants could also learn about the problems discussed above from other people's negative experience in court, and the impact of court users' experience on public confidence will be discussed in the next chapter. The number of civil cases stopped rising and even reduced slightly from the mid 1990s, as Xin He argues, one of the reasons might be that some people do not have confidence in courts and would rather not to use them.[354] Furthermore, formalization of courts has raised new problems, e.g. courts are reluctant to deal with the cases where the potential judgments are likely to be very difficult to implement or they are less able to deal with cases calling for local knowledge.[355] Although what has been discussed above does not occur in every case, these factors could still contribute to the explanation of the public's doubt about the impartiality of the court and the fairness of the decision in some high-profile cases. It is also doubtful that whether public pressure in the high-profile cases could always compromise or endanger judicial independence. As established in Chapter 1, the dynamics of public opinion's influence on the Chinese judiciary is indirect and often through other powerful extra-legal influences. To develop this, the next section will critically analyse the reality of judicial independence in China.

3.1.2 Judicial Independence in Mainland China: The Gap within the Constitution and the Problematic Facts

The term "judicial independence" is not established or officially used in the state ideology in China, although it is more often used and discussed in Chinese legal research literature. Instead, "independent adjudication" (*shenpan duli*) or "independent exercise of

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[349] Xin He, 'Defectively Operated Primary Courts?' (运作不良的基层法院？), *Law and Social Sciences*, Vol. 1, 2006, p. 50.
[350] Fu, 'Putting China's Judiciary', p. 208.
[351] ibid, p. 209.
[352] He, 'Defectively Operated', p. 52.
[353] ibid, p. 58.
[354] ibid, p. 30-38, 58-62.

the power to adjudicate by the courts" (*duli xingshi shenpanquan*) has been provided in China's constitution by excluding the influence from "any administrative organs, social organizations and individuals".[356] This is different from how "judicial independence" might be recognized in a liberal democracy, as Chinese judges have explicitly expressed that they are not the final decision maker and are discontent about the various influences that they are subject to.[357]

Independence of individual judges is absent from the constitution and institutional independence is limited because the constitution clearly states that the courts are responsible to the People's Congress of the same level ("the organs of state power who create them").[358] The law provides that the court has to report its work to the People's Congress and its Standing Committee of the same level;[359] generally, the president of each court should be elected by the People's Congress of the same level, the Standing Committee of the People's Congress has the power to appoint and dismiss other judges of the courts of the same level (except assistant judges) granted by the law.[360] The term of the president of each court is the same as the term of the People's Congress at the same level.[361] It skirts round whether the People's Congress and the CPC can intervene in individual cases.

The law provides that when the local People's Congress is holding meetings, over ten deputies can present a bill of addressing inquiries to the court dealing with their concerns;[362] although it does not explicitly state that the deputies could inquiry about individual cases. In practice, the People's Congress can intervene in individual cases, which is known as "supervision over individual cases" (*gean jiandu*). For example, in the case of cracking down on counterfeit products in Jiajiang, a factory received administrative sanction from the local Bureau of Quality and Technology Supervision and sued the bureau for exceeding their authority by law; after extensive media coverage along the lines of that "the people who are cracking down on counterfeit products were

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[355] ibid, p. 60-61.
[356] Article 126, Section 7, Chapter 3, The Constitution of the PRC.
[357] Mike McConville *et al.*, *Criminal Justice in China An Empirical Inquiry* (Edward Elgar Publishing 2011) p. 403–405.
[358] Article 128, Section 7, Chapter 3, The Constitution of the PRC.
[359] Article 16, Chapter 1, The Law of the Structure and Framework of the People's Courts of the PRC.
[360] ibid, Article 34, Chapter 3.
[361] ibid, Article 35, Chapter 3.

sued", over forty deputies questioned the court's intention of dealing with this case, and strongly demonstrated their anger against the court accepting to hear the case presented by a producer of counterfeit products, regardless of the presidents of two local courts' explanations of the legal ground for hearing this case and other legal issues involved; eventually, under great pressure, the local Bureau of Quality and Technology Supervision won the case.[363] There are other types of "supervision over individual cases" such as: some deputies of the People's Congress perceive that there are errors in the judgment and talk to the president of the court and demanding amendment within given time etc.[364] Chinese scholars have expressed their concerns about such "supervision over individual cases". For example, Chen Ruihua argues that the local People's Congress might intervene in a case for the local interests rather than the interest of justice, and the court has to "voluntarily" accept the "supervision" as theoretically the People's Congress has the power to stop voting for or even dismiss the current president of a particular court, or refuse to appoint certain judges etc.[365] A staff member of the SPC told a journalist that some deputies asserted that if they could not receive an explanation of an individual case to their satisfaction, they would veto the work report of the court and would also encourage other deputies to do so.[366] The law does not provide for the consequence of a failed work report, the SPC is still under pressure and made an effort to communicate with the deputies to explain the issues or cases that they are concerned about and earn their support when the National People's Congress is holding its annual meeting.[367] Some deputies even take advantage of their status as deputies and attempt to influence the judges of the cases where they were the parties, although the SPC claimed that the court would still decide the case according to the law.[368] However, whether the court actually compromises their decision to such pressure, this system could have caused damage to the

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[362] Article 28, Chapter 2, the Law of the Structure and Framework on the Local People's Congresses and Local People's Governments of the PRC.
[363] Chen Ruihua, *Visible Justice* (看得见的正义) (1st Edition, China Legal Publishing House 2000) p. 234-236.
[364] ibid, p. 237.
[365] ibid, p. 242.
[366] Zhao Lei, 'The Moment of the SPC and the SPP at the Annual National People's Congress and the Annual Chinese People's Political Consultative Conference: Between Supervision over individual cases and Judicial Authority' ("两高"的两会时刻：在个案监督与司法权威之间) (*Southern Weekend*, March 18th 2010) <http://www.infzm.com/content/42713> accessed March 19th 2014.
[367] ibid.
[368] ibid.

appearance of the independence of Chinese judiciary, and might have a negative impact on the public confidence.

Theoretically the influence from the administrative branch should be excluded; however, in fact the government still remains a strong influence over the court, which will be discussed later in this section. This suggests that even “independent adjudication”, whose value is acknowledged by Chinese law but indicates less independence than “judicial independence” as it would be recognized in many western jurisdictions, is not free from problems. This part will discuss the major external pressure to institutional judicial independence and then discuss the internal pressure to the independence of individual Chinese judges.

One of the major external influences on the Chinese court system is from the CPC. Political intervention of the CPC occurs from time to time.[369] Some Chinese judges claimed that such intervention does not only occur in sensitive cases but might also occur in routine cases.[370] The CPC keeps the administration of justice under control by its control over the appointment of judges[371] (the People’s Congress has to follow the leadership of the CPC) and the Political and Legal Committee of the CPC (PLC). Political correctness is not the only requirement of eligibility; however, it still remains an important prerequisite, usually implicitly expressed as “good political consciousness”.[372] In practice, most Chinese judges are CPC members, e.g. almost 80% of female judges in Yunnan Province are CPC members.[373] In the state ideology, the influences from the CPC remain legitimate when they appear as “leadership” or “supervision”. A typical example is the PLC, which is an organization of the CPC to “direct” the political and legal institutions of the same or lower level to follow and implement the policies of the party.

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[369] Jamie P. Horsley, ‘The Rule of Law in China Incremental Progress’ in *The China Balance Sheet in 2007 and Beyond*, The China Balance Sheet Project Research Paper, <http://csis.org/files/media/csis/pubs/070502_cbs_in_2007_and_beyond.pdf> accessed March 28th 2012, p. 102.

[370] McConville *et al.*, *Criminal Justice in China*, p. 401.

[371] Wei Qiong, ‘Reflection and Reconstruction of the External Independence of China’s Adjudication System’ (对我国审判系统外部独立性的反思与重构), *Theory and Reform*, No. 4, 2006, p. 125.

[372] For example, ‘The Open Announcement of Selecting Judges, Procuratorators and Other Staff at Anqing City’ (安庆市公开选调法官、检察官和工作人员公告) (*Organization Department of Susong CPC Committee*, November 12th 2013) <http://ss.ahxf.gov.cn/gbgz/gxxx/400907.SHTML> accessed March 19th 2014.

[373] Meng Jing, ‘The Survey Report of the Female Judges in Yunan Province’ (关于云南省女法官队伍情况的调研报告) (*Yunnan Courts*, March 1st 2010) <http://www.gy.yn.gov.cn/Article/sflt/xsyd/201003/17731.html> accessed March 19th 2014.

The court has to listen to the PLC, which usually consists of senior officials of the government, police force, public prosecution, the People's Congress, the CPC, and the president of the court and so forth, which makes it a very powerful and influential organ. In practice, the head of the local PLC usually tends to be the head of the local police force although this is changing,[374] and the president of the local court and other judges have to listen to this powerful person which could constitute pressure on judges and compromise their impartiality.

The PLC can intervene in individual cases and "coordinate" between the police force, public prosecution and the court, if it is a major and complicated case. This rule is not provided for by any legal resource; however, it has become a convention through practice.[375] It is in contradiction not only with the institutional independence of the court but also with the independence of the prosecution and the police, and therefore it is responsible for some serious miscarriages of justice which have aroused intense public criticism. A typical example is the case of She Xianglin who was convicted of murdering his wife. The HPC of Hubei sent the case back to the trial court for a retrial for the reasons that "the facts are not clear and the evidence is not adequate". However, the local PLC held a coordination meeting and made a decision that it was a murder case and the prosecution should prosecute; and "as there are three out of eight factual issues mentioned by the higher court cannot be cleared up, the case should be handled at a less severe level and She Xianglin should get imprisonment."[376] Subsequently, the prosecution prosecuted and accused She Xianglin of murder, and predictably the court convicted him of murder and announced a sentence of 15-years imprisonment. She Xianglin appealed but failed.

[374] Shen Xinwang and Shen Haijiao, 'The Secretary of PLC also Takes the Position of the Head of Public Security Bureau has Caused Controversy It Might Produce more "Solid Cases" ' (政法委书记兼任公安局长引争执 或致更多"铁案") (*Chinanews*, March 25th 2010) <http://www.chinanews.com/gn/news/2010/03-25/2190487.shtml> accessed March 21st 2014; Sun Weili, 'The Media Provided Statistics that only 4 Provinces Secretary of PLC are also the Head of the Police' (媒体统计显示仅剩 4 省政法委书记兼公安"一把手") (*Xinhua*, August 20th 2013) <http://news.xinhuanet.com/local/2013-08/20/c_125203613.htm> accessed March 21st 2014.
[375] Yan Li, 'The Unwritten Rule of "Grievance Coordination Meeting" of Local Political and Legal Committee Should Be Abolished' (地方政法委"冤案协调会"的潜规则应该予以废除), *Legal Science Monthly*, No. 6, 2010, p. 40-41.
[376] ibid.

However, after about 11 years his wife turned up alive and the conviction was eventually quashed.[377]

Another significant external influence is from the government. In an interview, a Chinese judge complained that the interference mainly comes from the government.[378] A simple comparison with criticisms from the government or politicians in other systems would be misleading, because whether it constitutes an overwhelming pressure on judges depends on the constitutional and political context. For example in the US, judges are also subject to criticism and pressure from the political branch, but it is not decisive; e.g. a federal judge, Judge Harold Baer, was suggested to resign by the president due to an unpopular judgment; but "Judge Baer was not in any real peril of losing his job" as federal judges are secured by tenure.[379] In mainland China, there is no such protection for judges and, therefore, judges are more vulnerable to this kind of pressure. The government does not always respect the decisions of courts, e.g. in an administrative case caused by a dispute of the mining right of a local coal mine, a local government refused to implement a court's decision by giving its own decision,[380] which suggests the Chinese judicial system lacks its authority when encountering the government. As the status of a court is lower than a government of the same local level and the funding of courts is dependent on local budget,[381] it is hard to expect the court to be able to resist intervention from government.

However, a few Chinese scholars noticed that Chinese courts sometimes might tactically deal with external pressure rather than just simply compromise. Hualing Fu has provided several examples, e.g. render a judgement before pressure arrives.[382] Xin He gives a more detailed example of how courts avoid filing cases of "married out women" (MOW).[383] Married out women refer to the women who moved to a new village after

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[377] Li Yanlin and Mao Guanfeng, 'The Case of She Xianglin is Retried Today "Wife Killer' is Announced Innocent in Court' (佘祥林案今日再审 "杀妻者"被当庭宣判无罪) (*Chinacourt*, April 13th 2005) <http://old.chinacourt.org/public/detail.php?id=158116> accessed June 4th 2012.
[378] Du Zhina, 'Judges: Pressure Comes from both the Outside and the Inside of the Court' (法官：压力来自法庭内外), *Law and Life*, No. 9, 2005, p. 22.
[379] Abrahamson, 'Courtroom with a View', p. 17-21.
[380] Wang Wenzhi and Xiao Bo, 'Government Meeting Squashed Judgment' ("判决会"否了判决书), *Government Legality*, No. 8, p. 16-17.
[381] Wei, 'External Independence', p. 125.
[382] Fu, 'Putting China's Judiciary', p. 205.
[383] Xin He, 'Why Did They not Take on the Disputes? Law, Power and Politics in the Decision-making of Chinese Courts', *International Journal of Law in Context*, Vol. 3, Iss. 3, 2007, p. 203-212.

getting married. The disputes are about "whether MOW are eligible for sharing compensation, dividends and relevant benefits of their home or destination villages".[384] The land in Chinese villages is under collective ownership by the villagers. In contemporary urbanization, some rural land is transformed to urban land through expropriation and the collective owners can divide the compensation. The fewer owners, the more compensation individuals can get. Therefore, both the home villages and the villages in which these women moved refuse their requests for compensation. Local courts have arranged legal explanations for refusal to handle these cases and resisted pressure from the government and the party committee to handle them. However, the real reason explained by Xin He is that if a court files the cases they will face a dilemma: if the court approves MOW's requests according to the principle of gender equality established by law, the decision would be unenforceable as the majority of villagers will not obey it; if the court rejects MOW's requests, it is against the legal principles and MOW will appeal or petition and bring criticism on the courts.[385] The court arranged tactical legal interpretation for resistance to the government and the party's pressure to deal with MOW cases: they argued that "there are barriers in the laws preventing the courts from taking the disputes" such as procedural difficulties, no authority to review the decisions of the village members' meeting, and no clear applicable law.[386] Even if subsequently courts opened a narrow gate for MOW disputes, it still pushed the responsibility to make a substantive decision to the local government.[387] However, even though the court arranged legal reasons for their resistance, it is mainly for self-interest rather than the interest of justice, which deviates from the aim of establishing judicial independence. Therefore, this kind of strategy does not indicate an improvement in the rule of law but reveals a judiciary which lacks authority and support before the local public.

Chinese courts are also subject to internal influences from within the judicial system due to the relationship between the courts of lower level and higher level. An example is a practical system which is usually referred to as "the system of instructions of individual cases upon requests". If a court is not sure how to deal with procedural matters or substantive matters of a particular case, it can consult another court of higher level and get

[384] ibid, p. 205.
[385] ibid, p. 203-212.
[386] ibid, p. 209-210.
[387] ibid, p. 212-223.

replies.[388] As a judgment revised on appeal could be regarded as a misjudged case and judges might get punished (which will be developed later), the opinions of judges from the courts of higher level could constitute great pressure for the trial judges,[389] even when such opinions are not made on request.

Individual Chinese judges are no more independent from pressure than Chinese courts are. Some Chinese judges might take efforts to resist pressure; however, research notes that it appears to be extraordinary.[390] This problem is relevant to an view that judicial independence only indicates institutional independence without acknowledgement of independence of individual judges;[391] the intervention in judicial independence only refers to the external intervention and does not include intervention from the court system, as "an independent trial includes all the work relevant to the trial in the court rather than only the work of the collegiate panel".[392] This view is becoming less popular among Chinese scholars, as the importance of individual judges' independence has been acknowledged by Chinese scholarship nowadays.[393] Nonetheless, those formal institutions which jeopardize individual judges' independence still remain and function, the same as informal pressure. The most recent "five-year judicial reform" is very reserved about judicial independence, and the outline only simply mentioned the institutional independence.[394] The new judicial reform, as a report of a research institute argued, is a bit "retrogressive" on judicial independence compared with the previous

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[388] Wan Yi, 'The Instructions of Cases upon Requests System is Beset with Problems both in History and Reality' (历史与现实交困中的案件请示制度), *Legal Science Monthly*, No. 2, 2005, p. 9.

[389] Feng Jialin, 'Abolishment of the System of the Instructions of Individual Cases upon Requests should be Based on the Reform of the Current Accountability System of Misjudged Cases' (取消个案请示应以改革现行错案追究制度为基础), *Journal of Law Application*, No. 9, 2006.

[390] McConville *et al.*, *Criminal Justice in China*, p. 409.

[391] Sun Changli, 'The System that the President of the Court and the Chief Justice of the Tribunal Examine and Endorse Cases cannot be Abolished' (法院院、庭长审批案件的制度不能取消), *The People's Judicature*, No. 4, 1981, p. 13.

[392] Xu Yichu, 'The President of a Court Examine and Endorse Cases and Judicial Independence' (法院院长审批案件与审判独立), *The People's Judicature*, No. 6, p. 7.

[393] Wang Dezhi, 'Promote Judicial Reform by ' (以保障法官独立为核心推进司法改革), *Studies in Law and Business*, No. 1, 1999, p. 112-118; Wang Xianrong, 'Judge's Independence -- Fundamental Premise for Judicial Justice and Inherent Meaning for Judicial Independence' (translation in the journal) (法官独立——司法公正之根本前提和司法独立应有之义), *Hebei Law Science*, Vol. 24, No. 3, 2006, p. 121-126.

[394] SPC, *The Outline of the Third Five-year Reform of the People's Courts (2009-2013)* (人民法院第三个五年改革纲要（2009-2013）), Document Number [2009] No. 4 (法发〔2009〕14 号), March 17th 2009.

reform programme.[395] The over-focus on the people's comments on the judicial system and some political requirements,[396] and some reform of the adjudication committee and the system where a court can consult another court of higher level for advice on a particular case have done even more damage to judicial independence.[397] Some formal institutions, e.g. the adjudication committee and the system where a judgment should be scrutinized and endorsed by the chief justice of the tribunal which the trial judge or the collegiate panel belong to or by the president of the court before it is finally stamped and issued to the parties and so forth, reinforced the administrative characteristic of adjudication and facilitates the influence which might compromise the independence of the collegiate panel.[398] These institutions are under criticism;[399] nonetheless, they still generally remain in courts of each level. Some Chinese judges perceive that there are incompetent judges who "need supervision and control".[400] However, this thesis argues that the problem should be dealt with by a reform of the selection and appointment procedure of judges to ensure only competent candidates should be selected rather than employ such methods which could compromise judges' independence and impartiality.

The adjudication committee is the highest internal authority to make decisions on a case in every court.[401] The members do not hear the case but have the final word. It is a formal institution provided by law.[402] Major or complex cases could be discussed by the adjudication committee;[403] however, what constitutes a major or complex case is not specified by law and is left for each court to decide on their own. In practice, Chinese

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[395] Centre of Judicial Studies of the Southwest University of Political Science and Law, *Annual Report on China's Judicial Reform* (2009) (the original and full version) <http://justice.fyfz.cn> accessed June 23rd 2012, p. 20; another shorter and revised version is available in *Tribune of Political Science and Law*, Vol. 28, No. 3, 2010, p. 20.
[396] ibid.
[397] ibid, p. 56.
[398] Institute for Advanced Judicial Studies, *Annual Report on China's Judicial Reform (2010)* (the original and full version) <http://justice.fyfz.cn> accessed June 23rd 2012, p. 21; another shorter and revised version is available in *Tribune of Political Science and Law*, Vol. 29, No. 3, 2011, p. 133-153.
[399] Zhu Zhijun, 'The Internal Request within the Court System should not be Continued' (法院内部请示风不可长), *Law Science Magazine*, No. 4, 1999, p. 50-51.
[400] McConville *et al.*, *Criminal Justice in China*, p. 411.
[401] SPC, *Implementation Opinions on the Reform and Improvement of the Adjudication Committee System of the People's Courts by the SPC* (最高人民法院关于改革和完善人民法院审判委员会制度的实施意见), Document Number [2010] No. 3 (法发〔2010〕3 号), January 11th 2010, Article 3.
[402] Article 11, Chapter 1, The Law of the Structure and Framework of the People's Courts of the PRC.
[403] ibid.

judges submitted cases which are not major or complex just to avoid responsibility[404] and many sensitive cases are also submitted.[405] This is mainly because of "the accountability system of misjudged cases", where judges might get punished for misjudged cases, e.g. reduction of salary or even removal from the office.[406] There are no consistent criteria for what constitute a misjudged case or definite instructions on how to call judges to account, although the SPC gave a few guidelines,[407] every court has their own policy,[408] which is criticised by a number of Chinese scholars.[409]

Judicial independence should always be alongside accountability. However, the adjudication committee both jeopardized the independence of individual judges and had a negative impact on accountability. In Xin He's research of an adjudication committee in a local court, the committee becomes "a good shelter for avoiding risk", because it is the committee's decision and therefore the trial judges can "exempt themselves from potential responsibility".[410] Moreover, the adjudication committee does not like tough cases either and attempts to protect themselves from risk. For example, with regard to civil cases, they "would either uphold the proposed opinions, or seek instructions from the upper-level court". [411] Generally, the adjudication committee sometimes becomes an option for judges to protect themselves from potential risk even when there are no

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[404] Li Hepeng, 'The Scope of the Cases that the Adjudication Committee Discuss should be Clear' (审判委员会讨论案件范围应予明确), *The People's Judicature*, No. 11, 2010, p. 96-97.
[405] Hong Hao and Cao Xuhui, 'An Empirical Analysis on the Function of the Adjudication Committee of the Courts at Grass-root Level' (基层法院审判委员会功能的实证分析), *Law Review*, No. 5, 2011, p. 123-130.
[406] He Rikai and He Yan, 'Analysis on the Practical Situation of the System of Accountability of Misjudged Cases' (错案追究制实际运行状况探析), *Tribune of Political Science and Law (Journal of China University of Political Science and law)*, Vol. 22, No. 1, 2004, p. 151.
[407] SPC, *Measures to Call Judicial Officers of the People's Courts to Account for Illegal Trials (Tentative)* (人民法院审判人员违法审判责任追究办法（试行）), Document Number [1998] No. 15 (法发[1998]15号), August 26th 1998; SPC, *Disciplinary Measures of the People's Courts (Tentative)* (人民法院审判纪律处分办法(试行)), Document Number [1998] No. 16（法发〔1998〕16 号), September 7th 1998.
[408] Liu Xiaoming, 'On the Accountability System of Misjudged Cases of the People's Courts' (论人民法院错案责任追究制度), *Journal of Southwest University for Nationalities • Humanities& Social Sciences*, Vol. 25, No. 5, 2004, p. 127.
[409] ibid; He Rikai and He Yan, 'An Analysis of the Reality of the Accountability System of Misjudged Cases' (错案追究制实际运行状况探析), *Tribune of Political Science and Law*, Vol. 22, No. 1, 2004, p. 150-151.
[410] Xin He, 'Judicial Decision-Making in an Authoritarian Regime: Piercing the Veil of the Adjudication Committee in a Chinese Court' (2011) Centre for Chinese and Comparative Law working paper No. 1 <http://www6.cityu.edu.hk/slw/lib/doc/RCCL/RCCL_Working_Paper_Series-He_Xin(2011.07).pdf> accessed April 15th 2012, p. 19.
[411] ibid, p. 20.

complex legal issues involved.[412] Even if a decision of the adjudication committee appears a collective decision, the president of the court as well as "the political boss" has the final word.[413] A Chinese judge also claimed that a few individuals can manipulate the adjudication committee to achieve a particular decision.[414] Xin He, therefore, argued that the adjudication committee does not really protect Chinese courts or Chinese judges from external pressures or is able to provide a better decision, but "only adds another level of bureaucracy by depriving the adjudicating judges of their decision-making authority" and its "secretive" decision making process also facilitate corruption.[415]

Nonetheless, a few Chinese scholars still offer mild defences of this system. For example, Su Li argued that the adjudication committee could help judges to resist external pressure from the people who have a social connection with them politely by making an excuse that the adjudication committee is the ultimate decider and, therefore, they cannot do them a favour, and under a few circumstances judges even resist intervention from the local government through the adjudication committee.[416] He also cited some judges' point of view, i.e. it is more difficult to bribe nine judges (the number of the adjudication committee members) than one or two judges.[417] However, He Weifang responded that to prevent judicial corruption it is the system of decision making and the quality of judges rather than the number of judges that matters.[418] This thesis argues that the adjudication committee might shield Chinese judges from some external pressure under some special circumstances as an expedient; however, it is difficult to ensure judicial independence by an institution which is incompatible with judicial independence in its nature.

Besides what has been discussed above, public opinion becomes a concern within Chinese scholarship as it appears to influence judges and thereby compromises judicial independence and judicial impartiality. Ironically, the Chinese media also publish a large

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[412] Li Hepeng, 'The Scope of the Cases that the Adjudication committee Discuss Should be Clear' (审判委员会讨论案件范围应予明确), *The People's Judicature*, No. 11, 2011, p. 97.
[413] He, 'Adjudication Committee', p. 20-26.
[414] Li Chuansong, 'Overcome the Administrative Tendency in Trial Activities in Courts' (法院审判活动行政化之克服), *Legal Science Monthly*, No. 8, 2010, p. 120.
[415] He, 'Adjudication Committee', p. 30-34.
[416] Su Li, 'Investigation and Thinking of the Adjudication Committee System of the Courts of Grass-roots Level' (基层法院审判委员会制度的考察及思考), *Peking University Law Review* Vol. 1, No. 2, 1998, p. 344-345.
[417] ibid, p. 336.
[418] He Weifang, 'Several Comments on the Adjudication committee' (关于审判委员会的几点评论), *Peking University Law Review*, Vol. 1, No. 2, p. 367.

number of comments on public opinion as a threat to judicial independence and impartiality,[419] which creates an image that public opinion could be biased and put too much pressure on judges and that it, therefore, becomes one of the most serious risks for justice. Chinese judges sometimes are, indeed, concerned about public opinion of their cases; however, this is because "they know that it influences higher-ranking officials".[420] This is because that, as Liebman argued,

> In some cases, it appears that Party intervention is motivated by the fact that the case has resulted in popular attention, rather than the substance of the dispute. The Party is concerned with ensuring that the case is resolved in a way that comports with popular perceptions of justice. In these situations, Party intervention reflects both discomfort with courts resolving questions that have attracted popular attention and also a continuation of the imperial tradition of leaders serving as "father and mother officials" responsible for maintaining order and morality and preventing discontent. [421]

This is also relevant to social unrest in China, which will be discussed in the third part of this chapter. Therefore, public opinion's influence on judicial decision making is indirect and not decisive in mainland China, which hardly makes it a major risk for judicial independence and impartiality especially regarding other more powerful or even decisive influences which are discussed above. Liebman argues that "commitment to the rule of law has become an important part of state ideology and state legitimacy."[422] The idea of judicial independence, at least in terms of "independent adjudication",[423] usually with a twist of "Chinese characteristics",[424] was supported by Chinese scholarship. Nonetheless, through the tactical propaganda which portrays public opinion as a major obstacle to judicial independence as established previously, the state might attempt to distract the people's attention from what really undermines judicial independence and attempt to exclude public interference in their monopoly of judicial power, which is

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[419] Wen He, 'The Scales of Public Opinion: Should it Lean to the Justice or Xia Junfeng' (舆论的天平: 该倾向司法还是倾向夏俊峰?), *Legal Daily*, September 28th 2013, p. 1.
[420] Benjamin L. Liebman, 'Assessing China's Legal Reforms', *Columbia Journal of Asian Law*, Vol. 23, Iss. 1, 2009, p. 24.
[421] Benjamin L. Liebman, 'Watchdog or Demagogue? The Media in the Chinese Legal System', *Columbia Law Review*, Vol. 105, No. 1, 2005, p. 152.
[422] Liebman, 'Assessing China's Legal Reforms', p. 18.
[423] Zhou Yongkun, 'Upholding Independent Adjudication and Preventing Corruption' (坚持独立审判与克制权力腐败), *Legal Science Monthly*, No. 11, 2010, p. 12-16.
[424] Wan Chun, 'On Establishing Judicial Independence of Chinese Characteristics' (论构建有中国特色的司法独立制度), *Jurists Review*, No. 3, 2002, p. 70-80.

subject to "supervision by public opinion" (this term will be developed in Chapter 5). Judicial independence, therefore, becomes a matter of the Chinese judiciary being independent from the people rather than from the government. And it might have a negative impact on adjudication if isolating the judiciary completely from the people, as "judicial fact finding... calls for the evaluation of evidence in the light of commonsense and experience". [425] One might argue that institutionalized public participation is established in mainland China and, therefore, the Chinese judiciary is not isolated from the public and the judicial power is not monopolized by the state but shared by the people. The response to such potential criticism and a further defence of this thesis's argument will be given in the next part of this chapter by critically discussing public participation in adjudication in mainland China.

At the end of this part, this thesis acknowledges that the problem of independence of the individual Chinese judges might be indirectly reinforced by public attention and opinion, e.g. in an intermediate court, "the major, complex cases of high social concern" are required to report to the court of higher level;[426] in a primary court, "the cases where groups petitioned, which draws attention from media and public opinion, and whose result might cause major social effect" should be presented to the adjudication committee to be discussed and decided,[427] which is largely compatible with the SPC's opinions.[428] A case attracting great public attention is likely to be a sensitive case and might offer "sufficient reason to justify intervention".[429] However, taking measures to "direct" public opinion instead of improving judicial independence is unlikely to improve the rule of law. To be clear, this thesis is not taking a populist position, while the state appears to be more interested in dealing with public opinion, as "directing" public opinion is frequently mentioned, which will be developed in Chapter 5. Liebman, therefore, argues that one of

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[425] UNODC, 'Commentary', paragraph 32, p. 44-45.

[426] 'Six Measures are Taken by the IPC of the City to Regularize the Trials of the Crimes by Taking Advantage of Duty' (市中院六项举措规范职务犯罪案件审判) (*Chifeng.gov*, March 22nd 2012) <http://www.chifeng.gov.cn/html/2012-03/24f857b5-a6c4-463a-a432-3c6c15757fe3.shtml> accessed April 17th 2012.

[427] 'The Rules of the Adjudication Committee Discussing Cases of the People's Court of Pingfang District of Haerbing City' (哈尔滨市平房区人民法院审判委员会议案规则) (*The Court of Pingfang District*, February 29th 2012) <http://hebpf.hljcourt.gov.cn/public/detail.php?id=19> accessed April 17th 2012.

[428] SPC, *Implementation Opinions on the Reform and Improvement of the Adjudication Committee System of the People's Courts by the SPC* (最高人民法院关于改革和完善人民法院审判委员会制度的实施意见), Document Number [2010] No. 3 (法发〔2010〕3 号), January 11th 2010, Article 11.

the characteristics of the Chinese judicial system is the tension between professionalism and populism, and the last decade has witnessed a transfer of focus from professionalism to populism.[430] Liebman explains that

> populism in the Chinese legal system refers to a range of forms of public expression, from public opinion created by the state-run media, to opinion in internet forums, to collective action and individual protest by persons seeking redress of grievances... efforts by legal institutions to seek public support by aligning outcomes with perceived dominant social norms or conceptions of popular morality or by making legal institutions more accessible.[431]

However, Liebman also noted that “public opinion remains filtered and often refers to the views that party leaders have decided to embrace”, and therefore “court efforts to appear responsive to popular opinion may be targeted more to party leaders than to the public”.[432] This suggests that what the term “public opinion” actually indicates in the context of China is distinct from what it literally suggests. In both the state ideology and law of mainland China, “public opinion” could be and should be introduced to the justice system through a more regulated channel, which is the institution of public participation in adjudication -- mainly the People’s Assessors’ system. The next part will critically discuss public participation in China to discover whether public opinion is introduced into adjudication or whether this is used as a tactic.

3.2 Public Participation in Adjudication in Mainland China: Introducing Public Opinion to Adjudication and Improving Public Confidence?

Mainland China claims that its courts and judiciary are the people’s courts and judiciary, as they are officially referred to, that they are of the people and administer justice for the people. The people’s adjudication and judicial democracy (which usually

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[429] Benjamin L. Liebman, ‘China’s Courts: Restricted Reform’, *The China Quarterly*, Vol. 191, 2007, p. 626, 629.
[430] Benjamin L. Liebman, ‘A Return to Populist Legality? Historical Legacies and Legal Reform’ in Sebastian Heilmann and Elizabeth J. Perry (eds), *Mao’s Invisible Hand The Political Foundations of Adaptive Governance in China* (Harvard University Press 2011) p. 170-171.
[431] ibid, p. 166.
[432] ibid, p. 184.

refers to public scrutiny of and public participation in the justice system)[433] is claimed to be a significant advantage of the judicial system of a socialist country. Institutionalized public participation in adjudication becomes "the most important form to realize judicial democracy".[434] An annual report pointed out that the ongoing reform and experimentation of public participation could improve public confidence in the judicial system and also improve democracy by the rule of law.[435] However, Hu Ling interpreted public participation as a "political strategy" against a lack of public confidence in the judicial system because of unfairness caused by judicial corruption, and its focus is not on the independent values of this system but on its possible protection on fairness.[436] This part will discuss the main institution of public participation in adjudication – the People's Assessors' system and an experiment – the People's Jury, with attempts to find out whether it is a genuine effort to improve the judicial system and public confidence or predominantly a political strategy.

3.2.1 The Problems of the People's Assessors' System in Mainland China with Regard to "Judicial Democracy" Promoted in the State Ideology: The Absent Public Opinion

The institutionalized form of public participation in adjudication in mainland China is officially referred to as the People's Assessors' system.[437] The first constitution of the PRC established this system which was a political institution more than a modern judicial institution as its main function was political, i.e. to maintain political legitimacy, shortly after the PRC was founded.[438] After abolishment, re-establishment and re-abolishment, the current constitution does not provide this system. However, the law of the structure and framework of the people's courts, the civil procedure law,[439] and the criminal procedure law[440] all still provide this system. It is one of the main tasks to improve the

[433] Chen Zhonglin, 'Judicial Democracy Is The Crucial Guarantee Of Judicial Impartiality' (司法民主是司法公正的根本保证), *Law Science Magazine*, No. 5, 2010, p. 23.
[434] Institute for Advanced Judicial Studies, *Annual Report (2010)* (the full version), p. 19.
[435] ibid, p. 21.
[436] Hu Ling, 'Multi-oriented Interpretation of the People's Assessors' System' (人民陪审员制度的多面向解释), *Law and Social Sciences*, Vol. 2, 2007, p. 124.
[437] Article 10, Chapter 1, The Law of the Structure and Framework of the People's Courts of the PRC.
[438] Hu, 'Multi-oriented Interpretation', p. 110.
[439] Article 40, Chapter 3, Part 1, The Civil Procedure Law of the PRC.
[440] Article 147, Chapter 1, Part 3, The Criminal Procedure Law of the PRC.

People's Assessors' system during the third five-year judicial reform plan.[441] The People's Assessors (PAs) can only sit in the trial of the first instance and cannot sit on appeal.[442] They can only sit with professional judges in a collegiate panel and cannot hear cases on their own.[443] Except that they cannot preside over any trial, they can exercise any other rights that a professional judge has when they are sitting.[444] This system is perceived as a reflection of democratic values in adjudication and sometimes it is discussed in the context of judicial democracy by Chinese scholars.[445] And judicial democracy is usually mentioned against the background of anti-corruption and the aim to improve judicial impartiality.[446] Some Chinese scholars have even argued that this system is also a political institution,[447] and the participation in adjudication is also a political participation,[448] and "the state attempts to reinforce the principle of the people's democracy by the People's Assessors' system".[449] Are the people really represented in adjudication? This part will answer this question by analysing the composition of PAs and whether this system functions in practice as it is expected to.

The law of the structure and framework of the people's courts provides a relatively loose restriction on the eligibility of PAs. Any Chinese citizens above 23 years old who have rights to elect and to be elected, and have never been deprived of these rights, are eligible.[450] To ensure PAs are lay members of the general public, members of the standing committee of the congress, the staff of courts, public prosecution, the police, national security agency, judicial administrative organ, and lawyers are excluded.[451] However,

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[441] SPC, *Third Five-year Reform (2009-2013)*.
[442] Standing Committee of the NPC, The Decision to Improve the People's Assessors' System by the Standing Committee of the National People's Congress (全国人民代表大会常务委员会关于完善人民陪审员制度的决定), August 28th 2004, Article 2.
[443] ibid, Article 1.
[444] ibid.
[445] Huang Suping, 'The Improvement of China's Lay Assessor's System in the Context of Judicial Democracy' (司法民主语境下我国陪审制度的完善), *Zhejiang Social Sciences*, No. 1, 2011, p. 152-154.
[446] Xiao Cheng, 'The People's Assessors' System: The Domination and Allocation of the State Power' (陪审制：国家权力的支配和再分配), *Law and Social Sciences*, Vol. 3, 2008, p. 212.
[447] He Bing, 'Professionalization and Democratization of Adjudication' (司法职业化与民主化), *Chinese Journal of Law*, No. 4, 2005, p. 108.
[448] Yuan Yong and Huang Jincai, 'On Enlarging Farmers' Political Participation and the Improvement of China's People's Assessors' System' (扩大农民政治参与与我国人民陪审制度的完善), *Law Science Magazine*, No. 10, 2011, p. 70-73.
[449] Xiao, 'Allocation of the State Power', p. 210.
[450] Article 38, Chapter 3, The Law of the Structure and Framework of the People's Courts of the PRC.
[451] Article 5, The Decision to Improve the People's Assessors' System of the Standing Committee of the National People's Congress.

there are further restrictions on the eligibility of PAs. Only "the people of good behaviour who are fair and upright" are eligible and generally they should have junior college qualification or above.[452] Although this principal provision does not definitely exclude the people whose educational level is below junior college, it still "generally" excludes a lot of people who cannot meet this requirement in practice, as an empirical study revealed.[453]

The diversity and representativeness of the PAs is already restricted by law and it is even more problematic in practice. According to a survey of the courts in Shandong Province, 84.7% PAs are CPC members and 42% of PAs work in partisan or political organs, and 65% of PAs have attained the required educational level.[454] In the jurisdiction of an intermediate court in Chongqing, a city of provincial level, 61.78% of PAs are people holding administrative power, which casts a shadow on judicial impartiality and fairness; and 93.41% of the PAs, are urban residents while most residents in the court's jurisdiction are rural residents.[455] In two local courts, many of the people who applied are the retired who look for something to do or the unemployed who try to get some income.[456] The lack of representativeness of PAs is also reflected by the courts' tendency within the selection of PAs according to an empirical study.[457] A Chinese scholar even argued that these PAs inclined to quasi-judgeship as the procedure of selecting, appointing, and training is similar to judges' and some of PAs even take oath.[458] It is also criticised by Chinese scholars that PAs are dominated by elites and therefore people cannot actually be tried by their fellow citizens and the PAs are likely to be biased.[459] Also, in several courts PAs are nominated by the court rather than selected at random in

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[452] ibid, Article 4.
[453] Liu Qinghui, 'Focusing on the Practice of Trial System of People's Assessors' (translation provided by the journal) (对人民陪审制运行过程的考察), *Peking University Law Review*, Vol. 8, No. 1, 2007, p. 23.
[454] First Civil Tribunal of the HPC of Shandong Province, 'A Survey Report on the Implement and Improvement of the People's Assessor's System of the Courts in the Whole Province' (关于全省法院落实和完善人民陪审员制度的调研报告), *Shandong Justice*, No. 3, 2005, p. 46-47.
[455] Lou Bixian, 'The Expression and Practice of the Democratic Values of the People's Assessors' System An Empirical Analysis Based on the Identities of the People's Assessors ' (人民陪审员制度民主价值的表达与实践 基于人民陪审员身份的实证分析), *Journal of Law Application*, No. 7, 2011, p. 101.
[456] Liu, 'Trial System of People's Assessors', p. 20-21.
[457] ibid, p. 23.
[458] Chen Jianghua, 'A Query of the Tendency of Quasi-judgeship of the People's Assessors' (人民陪审员"法官化"倾向质疑), *Academics*, No. 3, 2011, p. 15.
[459] Zhou Yongkun, 'People's Assessors Should not be Dominated by Elites' (人民陪审员不宜精英化), *Legal Science Monthly*, No. 10, 2005, p. 12-13.

each case or even generated from some settled collegiate panel.[460] The vice president of the SPC also admitted that several courts regularly summon a few PAs who therefore become "unofficial judges",[461] e.g. a court in Chengdu.[462] They even become the most welcomed assessors in several courts and it apparently would reduce the opportunity for more people to participate in adjudication.[463] Therefore, the representativeness of PAs is problematic.[464]

Moreover, this system is also criticised on the ground that PAs do not try and decide cases when they sit, in the sense that PAs usually do not have independent opinions but just repeat other judges' opinions when the collegiate panel discuss the case.[465] Empirical research confirms that PAs only play "a symbolic role in trials".[466] A number of Chinese courts also admit that PAs are summoned by the court as a relief to the tension caused by a heavy caseload and the insufficient number of judges.[467] The original democratic aim of this system is twisted in practice. Xiao Cheng argued that due to the rigorous bureaucracy of Chinese courts, PAs amount to mere decoration.[468] Although the PAs who are experts on the relevant issues of the cases are welcomed by courts, Xiao Cheng argues that this only reflects a demand for expert witnesses,[469] and it has nothing to do with representing

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[460] Liu, 'Trial System of People's Assessors', p. 25.

[461] Shen Deyong, 'Explanations about the Decision to Improve the People's Assessors' System (Draft)' (关于《关于完善人民陪审员制度的决定（草案）》的说明) (*Chinacourt*, April 14th 2004) <http://old.chinacourt.org/public/detail.php?id=111312> accessed March 8th 2012.

[462] Zhao Xiaoqiu and Fan Xiaodong, 'The People's Assessors, Left? Right?' (人民陪审员，向左？向右？), *Law and Life*, February (the first half) 2004, p. 9.

[463] Liu, 'Trial System of People's Assessors', p. 37.

[464] A sample list of political and education background, gender and occupation of the PAs in an rural area is available at: Zeng Hui and Wang Zheng, 'People's Assessor System with Problems: The People's Assessor System Covered by "the Elementary Court's Needing"' (translation of the title is provided by the journal) (困境中的陪审制度——"法院需要"笼罩下的陪审制度解读), *Peking University Law Review*, Vol. 8, No. 1, 2007, p. 58-61.

[465] Research Team of the IPC of Chengdu City of Sichuan Province, 'Presented Reality and the Path to Return – A Survey and Analysis of the Situation of the People's Assessors' System in Cheng Du' (呈现的实然与回归的路径——成都地区人民陪审制度运行情况实证调查分析), *The People's Judicature*, No. 7, 2006, p. 31; The First Civil Tribunal of the HPC of Shandong Province, 'A Survey Report on the Implement and Improvement of the People's Assessor's System of the Courts in the Whole Province' (关于全省法院落实和完善人民陪审员制度的调研报告), *Shandong Justice*, No. 3, 2005, p. 48.

[466] McConville *et al.*, *Criminal Justice in China,* p. 227.

[467] Xiamen Courts, 'The Departure and Return of Democracy: China's Local Knowledge of the Lay Assessors' System – An Empirical Study of the People's Assessors' System since May 1st of 2005' (民主的偏离与回归：陪审制的中国"地方性知识"——2005 年 5 月 1 日以来人民陪审制实证考察) (*Xiamen Courts*, May 15th 2009) <http://www.xmcourt.gov.cn/pages/contentview.aspx?cmslist=97&cmsid=66> accessed March 7th 2012.

[468] Xiao, 'Allocation of the State Power', p. 217.

[469] ibid, p. 218.

or introducing public opinion in the justice system. Even if there are very few PAs who actively participate in the discussion of the collegiate panel, however, as a significant percentage of PAs are staff of the administration branch, they might attempt to take advantage of this power as to expedite political policy.[470] Another risk brought by PAs to judicial impartiality is that a few PAs even try to put pressure on judges by their advantageous position or by warning that the parties might seek to petition if the judge insists on his own opinion.[471] Therefore, it is rare that a PA who comes from the general public genuinely has tried a case independently and impartially. The Chinese public are not represented through the People's Assessors' system.

However, does this system only function for the pragmatic sake of dealing with the courts' caseload? The data of how often PAs sit might provide some clues. PAs only sit in a small percentage of the cases at first instance. For example, in 2008, PAs sat in approximately 8% of cases at the first instance[472]; in 2010, the figure rose to approximately 13%.[473] Therefore, a Chinese scholar argued, with regard to an authorized document about this system, that the People Assessors' system only helps with caseload to a limited extent and the political function of this system to build up "the people's adjudication" outweighs the pragmatic function.[474]

This thesis agrees that this system bears important political symbolic functions. However, this thesis does not agree that this system could lead to "the people's

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[470] Lou Bixian, 'The Expression and Practice of the Democratic Values of the People's Assessors' System An Empirical Analysis Based on the Identities of the People's Assessors ' (人民陪审员制度民主价值的表达与实践 基于人民陪审员身份的实证分析), *Journal of Law Application*, No. 7, 2011, p. 102-103.

[471] ibid, p. 103. In a broad sense, petitioning refers to the activities that Chinese citizens present their concerns or issues through letters, emails, visits etc. to various authorities such as local or the central government, the courts, the local or national People's Congress etc., so that the state can hear and address citizens' concerns. However, it is controversial that whether it can effectively address Chinese citizens' concerns and the various problems of this institution are under criticisms in China.

[472] In 2008, PAs sit in 505,412 cases while the number of the tried cases of first instance is 6,285,400. See Xiao Yang, 'The Annual Work Report of the SPC' (*NPC*, March 17th 2009) <http://www.npc.gov.cn/npc/xinwen/2009-03/17/content_1538795_5.htm> accessed March 8th 2012; SPC, *The Table of the Statistics of the Cases of the First Instance of all Courts in China (2008)* (*SPC*, February 21st 2010) <http://www.court.gov.cn/qwfb/sfsj/201002/t20100221_1403.htm> accessed March 8th 2012.

[473] In 2010, there are 912,177 cases where PAs sit and the number of the tried cases of first instance is 7,022,142. See Wang Shengjun, 'The Annual Work Report of the SPC' (*NPC*, March 20th 2011) <http://www.npc.gov.cn/npc/xinwen/2011-03/20/content_1648067.htm> accessed March 8th 2012; 'The Statistics of all the Cases Tried by all the Courts in China (2010)' (*SPC*, March 24th 2011) <http://www.court.gov.cn/qwfb/sfsj/201103/t20110324_19084.htm> accessed March 8th 2012.

[474] Zhu Jingwen, 'The Change of the Lay Assessors' System in Contemporary China and Its Social and Cultural Background' (当代中国陪审制度的变迁及其社会文化背景), *Expanding Horizons*, No. 3, 2012, p. 63-64.

adjudication". There are problems of corruption during the process of selecting PAs, e.g. someone's relative helped him to ask for a favour from the president of a local court and finally was appointed as an assessor by the court (PAs can get paid).[475] It cannot ensure that the persons who suit this work best can be appointed[476] or the court can get the kind of assessors they prefer.[477] This system might also increase the risk of judicial corruption, i.e. some PAs became lawyers subsequently and take advantage of their personal connections with judges which were established when they served as PAs.[478]

What type of cases where PAs often sit could provide more understanding about the reality of this system? According to the SPC's judicial interpretation, "the cases which draw wide attention of the people or have relatively great social influence" should be tried by a collegiate panel which consists of judges and PAs.[479] Nonetheless, in the important and complex retrials, the cases where the accused is charged with breach of their official duty, e.g. corruption, bribery and malfeasance, and the cases where *falungong* are involved, the courts rarely summon PAs to sit.[480] These cases are very likely to draw attention from the public, but at the same time they are also sensitive cases and the Chinese courts are very cautious. The contradiction of the People's Assessors' system provides the Chinese courts with the possibility to give explanations or excuses about what cases should have PAs sit. The contradiction is that on one hand it is politically incorrect if the Chinese judicial system absolutely excludes the general public from adjudication at least it cannot appear to be so; on the other hand, PAs also have to decide legal issues but laymen generally do not have sufficient legal knowledge or skills to do so. Therefore, even though this system has various problems in practice, it is still kept in some non-sensitive cases as a symbol that the Chinese judges are under the scrutiny of the people and are informed about people's opinions; at the same time in sensitive cases the Chinese court can claim that the legal issues involved in the case are very complex and PAs are not able to handle them. Corresponding to this fact, as part of the "top-down"

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[475] Zeng and Wang, 'Elementary Court's Needing', p. 40-41.
[476] ibid, p. 56.
[477] Liu, 'Trial System of People's Assessors', p. 21.
[478] Zeng and Wang, 'Elementary Court's Needing', p. 53-55.
[479] SPC, *The Regulations of Several Issues of the People's Assessors' Participation in Adjudication by the SPC* (最高人民法院关于人民陪审员参加审判活动若干问题的规定), Document Number Judicial Interpretation [2010] No. 2 (法释〔2010〕2 号), January 14th 2010, Article 1.
[480] Xiamen Courts, 'China's Local Knowledge of the Lay Assessors' System'.

judicial reform,[481] the reform of the People's Assessors' system is dominated by the state.[482] As Xiao Cheng argued, the main aim of the People's Assessors' system is not to share the judicial power with the Chinese public; rather, it is to improve judicial impartiality and reinforce the legitimacy of the state through the political and historical resources of this system;[483] or to improve public confidence, an aim which is stated in several documents and speeches by the authorities.[484] But how?

The vice-president of the SPC, Shen Deyong, explained that PAs can help with legal education of the general public and persuade the parties to accept the decisions of the court.[485] As discussed in the last part of the previous chapter, to improve the public's understanding of the justice system could reduce public misunderstanding which results in negative opinions. However, against the background of this system, the educational effect only applies to very limited numbers of the members of Chinese public. Also, it is uncertain how much improvement could be done to this limited part of the public. As an empirical study found, not every Chinese court has arranged such training; even in the courts where training is arranged, it is quite simple and short, and some PAs skipped training or were not serious about the training.[486] If Shen Deyong attempted to express that PAs can help the general public become better informed about legal knowledge, there is no solid evidence to prove it. Considering what has been discussed previously, it would not be surprising that Shen Deyong also admitted that some PAs do not try cases "appropriately" and "express wrong opinions as they wish", and therefore it is necessary to "ensure the quality of the PAs" and to regulate "the management, training and assessment" of PAs.[487] In 2005, the SPC enacted a regulation about the management of PAs.[488] It is interesting that the state introduced PAs into the justice system in order to

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[481] Liebman, 'Restricted Reform', p. 622-629.
[482] Xiao, 'Allocation of the State Power', p. 220.
[483] ibid, p. 220.
[484] For example, SPC, *Several Opinions on the Further Reinforcement and Improvement of the Work of the People's Assessors of the Supreme People's Court* (最高人民法院关于进一步加强和推进人民陪审工作的若干意见), Document Number [2010] No. 24 (法发〔2010〕24 号), June 29th 2010.
[485] Shen Deyong, 'Explanations about the Decision to Improve the People's Assessors' System (Draft)' (关于《关于完善人民陪审员制度的决定（草案）》的说明) (*China court*, April 14th 2004) <http://old.chinacourt.org/public/detail.php?id=111312> accessed March 8th 2012.
[486] Liu, 'Trial System of People's Assessors', p. 23-25.
[487] Shen Deyong, 'Improve the People's Assessors' System'.
[488] SPC, *The Management Measures of the People's Assessors by the SPC (Tentative)* (最高人民法院关于人民陪审员管理办法（试行）), Document Number [2005] No. 1 (法发〔2005〕1 号), January 6th 2005.

scrutinize judges and improve impartiality and fairness; however, at the same time they also establish a system for the court to monitor PAs because they are concerned about that PAs might be detrimental to impartiality and fairness. This also suggests that the PAs, judges without robes, are not independent either. The problem of judicial independence is actually a lack of independence of the decision makers who appear to bear this role rather than only the professional judges.

As public confidence in the judicial system fundamentally depends on the situation of the system itself, it is unlikely to be improved without improvement of the system. This system might increase the risk of corruption as revealed by an empirical research.[489] The PAs might be unable to or reluctant to scrutinize judges.[490] This system is very unlikely to change those institutions which jeopardize the independence of individual judges e.g. the adjudication committee.[491] Therefore, it is difficult to expect the PAs to have any significant impact on reducing the problems such as corruption or a lack of independence which caused public criticism, and therefore are unlikely to automatically improve public confidence simply by their existence.

In summary, PAs are not representative, nor do they actually introduce the opinions of the people into adjudication. Neither have they improved the judicial system or public confidence. With acknowledgment of the problems of this system, a number of Chinese scholars argue that this system should be reformed[492] or new systems which can represent the people better, e.g. the People's Jury, should be established.[493] There are also experiments of different forms of public participation carried on in some Chinese courts under the acquiescence of the state, which will be analysed in next part.

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[489] Zeng and Wang, 'Elementary Court's Needing', p. 53-56.
[490] Liu, 'Trial System of People's Assessors', p. 36-37.
[491] ibid, p. 37-38.
[492] Zhao Xinhui, 'The Reform and Improvement of the People's Assessors' System – The Establishment of the People's Assessors' System of the Composite Style' (人民陪审制的改革与完善——谈"混合制"人民陪审模式的建立), *Journal of Southwest University of Political Science and Law*, Vol. 7, No. 6, 2005, p. 93-94.
[493] Xia Jing, 'Improve the Lay Assessors' System to Realize Judicial Democracy' (完善陪审制度, 实现司法民主), *Jurists Review*, No. 4, 2005, p. 19.

3.2.2 The Experiment of the People's Jury: Constructing and Taking Advantage of Public Opinion

Because of the awareness of the problems of the People's Assessors' system e.g. lack of representativeness, a new form of public participation in adjudication -- the People's Jury (*renmin peishentuan*) -- has been suggested by Chinese scholars and also tested in a number of local courts in China, mainly in Henan Province and Shaanxi Province.

The same Chinese word for jury in the common law system is used to name this new and experimental system. However, they are different. The People's Jury is not imported from the common law system; rather, it is a native product. The details may vary from different courts, however there is still something in common. The People's Jury can sit not only in criminal cases but also civil and administrative cases. They can sit both in the cases of the first instance and appeal.[494] According to the pilot guidelines enacted by the HPC of Henan Province and the pilot programs of other local courts, generally, the following cases are eligible for the People's Jury to sit: the cases of "great social impact", "the cases where the interests of the masses are involved", "the cases which might affect social stability", "the cases which the people's representatives, members of the CPPCC and the media pay close attention to", or the parties petitioned repeatedly and so forth.[495] These cases are relatively likely to draw the public's attention, but not all these cases must have People's Jury's participation, the court can decide on an individual basis. This provides the courts with flexibility, e.g. sensitive cases could be cases of "great social impact", but the court is unlikely to summon a jury. Therefore, it is interesting that according to what the pilot courts claimed in propaganda, the aim of the experiment is to facilitate the expression of public opinion and to inform judges better about public opinion, so as to ensure that the courts make a fair decision and therefore better public confidence will be achieved.[496] The People's Jury gives opinions on both factual and legal

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[494] HPC of Henan Province, *The Suggestions of the Pilot Work of the People's Jury (the Pilot Edition)* (关于开展人民陪审团制度试点工作的意见（试行）), 2010; cited by Liu Jialiang, 'The People's Jury: Between Ability and Limits' (人民陪审团制：在能度与限度之间), *Political Science and Law*, No. 3, 2011, p. 25.

[495] ibid, p. 20-21.

[496] Hu Xiaoyu, Guo yuehua, and Li Weidong, 'The Court of Taikang is Making Steady Progress with the People's Jury' (太康法院扎实推进人民陪审团工作) (*Chinacourt.org*, September 21st 2011) <http://old.chinacourt.org/html/article/201109/21/465108.shtml> accessed March 16th 2012; PLC of Baoji

issues, or on both conviction and sentencing in a criminal case.[497] As it is only an experiment, the People's Jury do not have any power to decide any matters in the case; its opinions are only important as a point of reference for judges.[498] Two scholars argued that this experiment has nothing to do with the common law jury trial, rather, it is an effort "to improve the mechanism by which public opinion enters into the adjudication", which is similar to *Ma Xiwu styled trial* (a distinctive trial style created by a communist judge called Ma Xiwu within the area controlled by the CPC during the era of China's war against Japan's invasion), one of whose characteristics is to consult the public before making a decision and introduce their opinions into his judgment.[499]

Another background of this experiment is a lack of public confidence in the judicial system and the perceived decline of judicial authority. Discontent over the court's decisions has caused a lot of petitioning, which is also known as *xinfang* or *shangfang*, which has got on most courts' nerves. (This will be developed in the next part of this chapter.) Also, the Chinese courts and judges are also under public criticism from time to time, as established previously. With this new system, the Chinese courts trying this experiment attempted to enhance both the parties' and the public's satisfaction with their decisions. The strategy associated with this new system to persuade the parties better is that the court can take advantage of the pressure of public opinion. Perhaps, it might be inspired by the experience of courts as to how great the pressure of public opinion would be. As the jurors are from the local community, their opinions could constitute a pressure on the parties. If their opinions are adopted by the judgment, the pressure from the local community can make up for the lack of the court's authority and the parties' confidence to the court to some extent. Based on several typical cases selected by the courts taking the experiment, scholars argued that this strategy works effectively in terms of persuading

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City, 'The People's Court of Fufeng County Summoned the People's Jury to Participate in the Trial' (扶风县人民法院试行人民陪审团参与案件审理) (*Political and Legal Public Information of Shaanxi*, September 19th 2011) <http://www.sxzf.gov.cn/news/ZFJD/2011/919/11919143833625I0EBF76JIKF7EB3CI.html> accessed March 16th 2012.

[497] Zhang Shuguang, 'The People's Jury: A Way out of Predicament – The Contribution and Inspiration of the People's Jury in the Courts at Henan' (人民陪审：困境中的出路——河南法院人民陪审团制度的贡献与启发), *Political Science and Law*, No. 3, 2011, p. 41.

[498] ibid.

[499] Wu Yingzi and Wang Xiaowen, 'Jury, Public Opinion and Civil Society – Start on the Experiment of the People's Jury in Hennan' (陪审制、民意与公民社会——从河南人民陪审团试验展开), *Political Science and Law*, No. 3, 2011, p. 12-14.

parties to accept the court's decisions.[500] In an interview, the president of the HPC of Henan also asserted that none of the parties of the criminal cases petitioned where the People's Jury sit.[501] Some Chinese courts, e.g. the court of Yanshi City, also claimed that the People's Jury system effectively solved the problems of petition.[502] However, this thesis is concerned about whether this system might facilitate repression and the state power's over-interference into citizen's personal matters. For example, in a report of a county court, it gave a divorce case as an example of success of this new system.[503] It is stated that the claimant wanted to divorce while the defendant refused. The judge tried very hard to mediate but failed. Subsequently, the judge summoned a jury of seven members and an audience of about 200 also attended the trial. With the help of the jurors, the parties' parents and several local cadres, the judge explained the opinion of the local public and finally achieved a successful mediation and the claimant decided not to divorce.[504] However, this thesis's concern might not apply everywhere in China. As Chinese scholars argued that this strategy is effective in a traditional closed society where "there is a high degree of interdependence between people" and customs have great sanction; but China is in social transformation and "the living community on which the pressure of public opinion is dependent collapsed" in some areas, and, therefore, the effectiveness of this strategy becomes limited.[505]

Furthermore, it is another issue whether the People's Jury can represent the community and introduce public opinion. In order to make the People's Jury more representative, the requirements of eligibility are more relaxed than that of the PAs, e.g. a juror only needs an education background of junior high school or above.[506] As nine-year primary school and junior high school education is mandatory in China, this requirement

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[500] ibid, p. 13.

[501] Deng Hongyang, 'Exclusive Interview of the President of the HPC of Henan Province' (本报专访河南省高院院长张立勇), *Legal Weekly*, June 10th 2010, p. 2.

[502] Zhang Dongxu and Zhang Hongbo, 'The People's Jury has Realized both Legal and Social Effect' ("人民陪审团"制度实现法律和社会效果双赢) (*Henan Court*, November 9th 2011) <http://hnfy.chinacourt.org/public/detail.php?id=122117> accessed March 22nd 2012.

[503] Wang Hongli and Xu Lei, 'The Mechanism of the People's Jury in the Perspective of the People's Nature of the Adjudication -- The Report of the Experimental Work of the People's Jury of the People's Court of Fufeng County' (司法人民性视野下的人民陪审团工作运行机制——扶风县人民法院开展人民陪审团试点工作的调查报告) (*Fufeng Court*, February 20th 2012) <http://ffxfy.chinacourt.org/public/detail.php?id=481> accessed March 16th 2012.

[504] ibid.

[505] Wu and Wang, 'Jury, Public Opinion and Civil Society', p. 13-14.

[506] Liu, 'Ability and Limits', p. 24.

is very inclusive. Other requirements remain similar to the PAs. In order to give ordinary people more opportunity to sit in the People's Jury, public officers and PAs cannot account for more than 30% of the jury pool in Henan.[507] However, this limit applies to the jury pool rather than a jury sitting in individual cases. Therefore, it is possible that all or most of the jurors of a particular case are these minority elite members of the jury pool. The problem that PAs are dominated by elites might remains within this new system. For example, in a criminal appeal where the death penalty might apply, most of the jury members are the Deputies of the local People's Congress or cadres rather than ordinary people.[508] It implies that in some cases, the Chinese jurors are not selected at random but rather purposively. For example, in sensitive cases, the Chinese court has to make sure the authority of the state will not be challenged; however, they also need to legitimate their decision if it is likely to be unpopular. A strategy could be to select jurors carefully and try to create an appearance that they represent public opinion even if they actually do not.

As this experiment is dominated by the court, the court can decide whether they would summon a jury; and they can summon a jury without anyone's application except that in criminal cases they have to get the consent of the prosecution.[509] Defendants in criminal cases and the parties in civil and administrative cases do not have any rights concerning the use of the jury. For example, in a criminal appeal, a jury was summoned after the president of the court "has overridden all objections".[510] Courts can also decide who sit on the jury and take advantage of it. Two Chinese scholars explained that as Chinese courts attempt to persuade the parties better and avoid petition, a tactic is to summon public officers or other people who might receive or deal with a petition to sit on the jury.[511] It is similar to a tactic that some courts might invite these people to attend meetings of the adjudication committee and discuss how to decide cases which draw

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[507] ibid.

[508] Wang Jiancheng, 'The Reform of Jury which is Neither Donkey nor Horse in Henan Should be Exercised with Caution' (非驴非马的"河南陪审团"改革当慎行), *Legal Science Monthly*, No. 5, 2009, p. 18.

[509] Tang Weijian, 'Commentary and Suggestions of the Experiment of the People's Jury' (人民陪审团制度试点的评析和完善建议), *Political Science and Law*, No. 3, 2011, p. 10.

[510] Wang, 'Neither Donkey nor Horse', p. 19; Xiao Zhiyong, 'The First Trial where "the People's Jury" Sit' ("陪审团"参与死刑二审的首次尝试), *Law and Life*, No. 4, 2009, p. 33.

[511] Wu and Wang, 'Jury, Public Opinion and Civil Society', p. 15.

prevalent attention or cases which can cause mass incidents easily.[512] This explanation could make sense, as the parties are unlikely to petition if they are informed that the officers who would deal with their potential petition also agree with the court. This could be partly exemplified by the opinions of the president of a local court – Liu Peng and a judge Su Jiacheng:

> especially for the cases where petitioners make trouble out of nothing or entangle petition and lawsuits, the representatives of the People's Congress, members of the CPPCC… should be invited to attend public hearings, and social forces and public opinion could be relied on to solve disputes and quench petitions and lawsuits.[513]

As this experiment is dominated by the court, the court can decide whether or not to summon a jury and what jury members to summon according to different pragmatic concerns and their self interests.

Therefore, this thesis argues that the People's Jury system is a test of a strategy to solve the problems caused by the crisis of public confidence in and support of the judicial system; the aims claimed by the authority, such as judicial democracy, to make the people better represented, or to introduce public opinion into adjudication in a more institutionalized way etc., are for political and propaganda purposes. And there is indeed a political shadow cast on this experiment. Some Chinese courts perceive this experiment as "an important political mission", e.g. a court sought support from the local police office to do political background investigation of every member in the jury pool to make sure that they have selected the people of "high political quality".[514] In 2010, the HPC of Henan Province required that every primary court should summon a jury in no less than five cases, the requirement for the intermediate courts is no less than ten cases.[515]

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[512] PLC of IPC of Dingxi Court, 'The Special Attendance System of the Adjudication Committee of the IPC of Dingxi City' (定西市中级人民法院审判委员会特别列席制度) (*Gansu Courts*, October 24th 2007) <http://www.chinagscourt.gov.cn/zyDetail.htm?id=122671> accessed April 17th 2012.

[513] Liu Rong and Liu Fuhua, 'The Standpoint and Strategy of the Court – The Opinions from the Conference of the Petitions Concerning Lawsuits' (法院的立场与策略——来自涉诉信访座谈会的观点), *The People's Judicature*, No. 2, 2006, p. 10.

[514] Tang Xianghui, 'The People's Jury Pool of the Court of Yanjin County is Increased to 10% of the Population of the County' (延津法院人民陪审团库已扩大至全县总人口的 10%) (*Yanjin Court*, August 25th 2010) <http://hnyjxfy.chinacourt.org/public/detail.php?id=161> accessed March 15th 2012.

[515] He Xi and Hu Naiquan, 'The Third Special Report of "Ongoing Open Justice" From People's Assessors to the People's Jury ' (《司法公开进行时》专题报道之三 从陪审员到人民陪审团), *Democracy and Legal System*, No. 17, 2011.

Under these circumstances, even if petitions could be reduced, it might not suggest improvement of public confidence in the judicial system. Based on what has been discussed previously, it is possible that this system could be abused for repression. The parties might have to compromise under the pressure of the People's Jury and the officers who might deal with petitions, however, they might not genuinely agree with the decision and therefore might not hold any more confidence in or support for the judicial system. Their experience might also affect the impression of other people to the judicial system. This is relevant to the impact of court users' experience on public confidence, which will be developed in the next chapter.

Besides, it is questionable whether a significant improvement of judicial independence could be achieved through this experiment. The problems of independence of the judiciary are still visible. To name only a few of its limitations, the prosecution still has a privilege over the court on some occasions, e.g. if the court has not decided to summon a jury while the prosecution claims that it should be summoned, the court should summon a jury.[516] The judge or the presiding judge of the collegiate panel cannot decide to summon a jury on their own; rather, they have to apply to the chief justice of the tribunal who will subsequently ask permission of the president of the court.[517] The adjudication committee, which jeopardizes the independence of individual judges, is still above the judges. As a guiding document provided that "if there are disputes between the collegiate panel and the consensus or the majoritarian opinion of the People's Jury, the collegiate panel should submit this case to the adjudication committee to discuss",[518] although its motivation is to make sure that judges will consider the opinions of the People's Jury seriously. If the independence of the Chinese judiciary cannot be improved, it is difficult to expect a significant improvement of judicial impartiality and public confidence.

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[516] PPC of Yangling District, 'The Announcement of the Selection and Appointment of the Members of the People's Jury Pool by the People's Court of Yangling District' (杨陵区人民法院选任人民陪审团成员库成员公告) (*Yangling District Court*, July 19th 2011) <http://xyylfy.chinacourt.org/public/detail.php?id=327> accessed March 15th 2012.

[517] Tang Weijian, 'Commentary and Suggestions of the Experiment of the People's Jury' (人民陪审团制度试点的评析和完善建议), *Political Science and Law*, No. 3, 2011, p. 10.

[518] HPC of Henan Province, *The Suggestions of the Pilot Work of the People's Jury*, 2010; cited by Liu, 'Ability and Limits', p. 21.

However, one scholar expects an improvement of public confidence from a technical perspective. Liu Jialiang argues that the People's Jury could help with better argued judgments, as "the collegiate panel must give necessary explanations if they do not adopt the opinions of the People's Jury".[519] However, the effect is limited as this rule is not adopted by every court. For example, in the court of *Fufeng* County, they only state the People's Jury has sat when it has done so, but will not mention the jury's opinions in the judgment.[520] Therefore, judges do not have to discuss more than they wish in their judgments. Also, as was discussed previously, the People's Jury and its opinions could be constructed by the court, it is even more doubtful that to what extent this experiment can help with better argued judgments. Therefore, the effect of this experiment on public confidence is rather uncertain. A significant phenomenon associated with the crisis of public confidence is mass incidents and petitions in China, which will be discussed in the next part.

3.3 A Social Context of the State's Concern about Public Opinion: Petitions and Mass Incidents

Social stability is stressed by the CPC and the state. Petitions and mass incidents caused by grievances are perceived to be serious disturbances of social stability and the "harmonious socialist society", which is a great concern to the Chinese authority. Mass incident is the literal translation of a Chinese word for group petitions, strikes, mass protests, and riots – *quntixing shijian*. It is an appearance of social instability where violence might be involved, and indicates that outrage of the public would not only be expressed through verbal criticism. This has raised great concerns of the state. As a political term, it is used in official documents without a clear definition.[521] Research literature in Chinese on this issue is very limited as it is a politically sensitive subject. Media reporting of this issue is also restricted.

Group petitions are an important form of mass incidents. Petitions refer to the Chinese word *xinfang* or *shangfang*, which is also translated as "the letters and visits

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[519] Liu, 'Ability and Limits', p. 21-22.
[520] Wang and Xu, 'People's Jury of the People's Court of Fufeng'.
[521] Yu Jianrong, 'The Main Types and Basic Characteristics of Mass Incident in Contemporary China ' (当前我国群体性事件的主要类型及其基本特征), *Journal of CUPL*, No. 6, 2009, p. 114.

system" in the literature.[522] They are complaints presented by letters or in person. Not every petition is caused by injustice in a legal case; however, there are a large number of petitions concerning lawsuits, which are known as *shesu xinfang* in China. Courts, government, and the People's Congress can all accept such petitions and petitioners might petition to some or all of them at the same time.[523] In the discussion of petitions, there is a distinction between the petitions presented to a court and the petitions about a decision or inaction of the court presented to other public offices, e.g. the petition office of the government. The latter might cause external pressure on the courts and judges, as Liebman argued that "courts are concerned that petitioners may take their complaints to higher ranking officials, or even to Beijing, resulting in pressure on the courts".[524] This could increase damage to the already bleak judicial independence. If intervention can eventually alter a judgment to a party's satisfactory, it might encourage more petitioners to seek external intervention to courts.[525] The court might also beome even more sensitive to public opinion under these circumstances. As Liebman argued,

> the legitimacy of China's leadership depends on its ability both to channel and to contain populism; concerns that popular expressions of outrage may spin out of control encourage rapid intervention in the legal system. The counter-majoritarian function of courts thus may be harder to accept in a non-democratic society, where courts lack authority and public confidence, than in a democracy. This is particularly the case in China, where the rise of social unrest makes officials particularly sensitive to public opinion and where the courts lack a history of being viewed as either authoritative or neutral.[526]

Social instability is perceived to be increasingly grave in China and Chinese courts are also confronted by mass incidents. For example, Ren Ningcheng, who works at the research office of a court, indicated that group petitions become outstanding these years.[527] For example, a local primary court was "encircled and blocked up" by petitioners

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[522] Liebman, 'Restricted Reform', p. 622.
[523] Liu Rong and Liu Fuhua, 'Conference of the Petitions Concerning Lawsuits', p. 7.
[524] Liebman, 'Assessing China's Legal Reforms', p. 24.
[525] Liu Hongwei and Zhang Xin, 'A Survey Report on Resolutions of Illegal Petitions' (关于解决违法上访的调研报告) (*Anyang IPC*, November 18th 2011) <http://ayzy.hncourt.org/public/detail.php?id=4578> accessed May 21st 2012.
[526] Liebman, 'Restricted Reform', p. 635.
[527] Liu Rong and Liu Fuhua, 'Conference of the Petitions Concerning Lawsuits', p. 7.

for about ten times from January 2008 until June 2009.[528] There are some mass incidents which directly aim at courts and are organized by the parties to the cases. However, most mass incident are organized or participated in by the people of similar interests where the decision of a case implies the result of their potential claims.[529] An example is rural land disputes. A Chinese judge expressed his concern that "sometimes only individual peasants present their cases, but there are hundreds of potential similar disputes that are awaiting the decision; if these cases are not handled appropriately… it might easily cause mass incidents".[530]

Mass incidents are an extraordinary way to make claims known. It is caused both by distrust of the court system and the blocked way of expression of public opinion.[531] Sometimes there are confrontation between the people and the government in some disputes of interests.[532] However, according to what was established in the first part of this chapter, the Chinese courts are too weak to give a decision which disfavours the government or even accept these cases. Even if the court does so, the decision would be very difficult to get enforced. Therefore, it might cause intense discontent and result in mass incidents, e.g. a local government refuted a judgment, which caused groups to fight with weapons.[533]

A lack of ability to prevent public criticism and mass incidents does not clear the Chinese courts and judges from pressure or responsibility. The situation of petitions and mass incidents affects the promotion and careers of Chinese judges, especially high rankings judges and government officials, who usually are also senior CPC members. This could be exemplified by a responsibility principle, i.e. "who is in charge and then who is responsible" alongside with territorial principle, and "generally the responsibility to quench petitions is taken by the institution which made the effective decision".[534]

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[528] Liu Ping, 'A Survey Report of the Mass Incident which Courts Encountered – With a Discussion on Judicial Fairness' (法院遭遇的群体性事件调查报告——兼谈司法公正), *Legal System and Society*, No. 6, 2010, p. 177.
[529] ibid, p. 178.
[530] Lian Yingting, Li Dahua, and Liu Yang, 'Rural Land Disputes Increased It Urgently Need the Society to Work Together to Resolve' (涉农土地纠纷增多 急需社会合力化解), *Legal Daily*, March 23rd 2012, p. 004.
[531] Liu, 'Mass Incident which Courts Encountered', p. 178.
[532] ibid.
[533] Wang Wenzhi and Xiao Bo, 'Government Meeting Squashed Judgment' ("判决会"否了判决书) *Government Legality*, No. 8, p. 16-17.
[534] Liu Rong and Liu Fuhua, 'Conference of the Petitions Concerning Lawsuits', p. 10.

Therefore, they tend to avoid decisions which are likely to cause petitions or protests it they can do so. A vice-president of the SPC, Su Zelin, pointed out that the petitions concerning lawsuits are a “barometer of the quality and efficiency of the administration of justice”, it is a “political mission” and “a major issue” to solve it mainly by trial rather than any other methods.[535] Due to the responsibility principle, when handling petitions, “the focus is on the action of petition itself rather than the problems reflected by petitions”.[536] “Persuading protestors to terminate their protests becomes more important than following legal and procedural standards”.[537] Methods vary with situations. Sometimes courts corrected errors if there are any.[538] Sometimes they “alter decisions, pay parties from court funds or pressure losing parties to pay more money than ordered by the court in order to assuage protestors”.[539] Sometimes petitioners are subject to retaliation or are kidnapped.[540] A petition might be cracked down on by force or tactics. However, the reason which caused petitions might still remain.

However, some courts attributed petitioning mainly to a lack of legal knowledge of the general public, and claimed further that legal education to the public should be improved and illegal petitioning should be cracked down on.[541] A counter-example is that even a Chinese judge chose to petition.[542] Actually, a fundamental reason for petitioning is a lack of independent legal channels against infringement of their rights.[543] Therefore, the solution is to establish a robust independent judiciary. Public participation with a non-independent judiciary would not be a substitute of an independent judiciary, although the new experiment of the People’s Jury seems to have reduced petitions as discussed in

[535] Su Zelin, ‘Seriously Implementing the Guiding Principle of “Administrating Justice Fairly and Serving the People Whole-heartedly” Improving the Work of the People’s Courts Related to the Petitions Concerning Lawsuits’ (认真贯彻“公正司法，一心为民”指导方针 开创人民法院涉诉信访工作新局面), *The People’s Judicature*, No. 2, 2006, p. 4-5.
[536] Liu Rong and Liu Fuhua, ‘Conference of the Petitions Concerning Lawsuits’, p. 6.
[537] Liebman, ‘Restricted Reform’, p. 630.
[538] ibid.
[539] ibid.
[540] Carl Minzner, ‘Social Instability in China Causes, Consequences, and Implications’ in *The China Balance Sheet in 2007 and Beyond*, The China Balance Sheet Project Research Paper, <http://csis.org/files/media/csis/pubs/070502_cbs_in_2007_and_beyond.pdf> accessed March 28th 2012, p. 68-69.
[541] Zhang Junting, ‘A Survey Report on the Problems of Petitions Concerning Lawsuits of Wugong Court’ (关于武功法院涉诉信访问题的调研报告) (*Xianyang Court*, April 24th 2012) <http://sxxyzy.chinacourt.org/public/detail.php?id=2145> accessed May 21st 2012.
[542] Huang Xiuli, ‘Petition in Robe’ (穿着法袍上访) (*Southern Weekend*, April 15th 2010) <http://www.infzm.com/content/43904> accessed May 21st 2012.
[543] Minzner, ‘Social Instability in China’, p. 58-62.

the second part. Neither does public participation always demonstrate democratic values and even the content of "democratic values" might vary in different contexts. In order to provide a further defence of this argument, this thesis will discuss jury trial in other common law jurisdictions predominantly in England and compare it with the practice of public participation in the justice system in Chapter 6.

Concluding Remarks

In the first part, it is established that the problems of the Chinese judicial system, including corruption, a lack of judicial independence and so forth are responsible for the problem of public confidence. It is also established that there are other more powerful or even persuasive sources of influence, e.g. the government, the party committee, the adjudication committee, court of higher levels and so forth. Compared with these sources, public opinion does not constitute a major risk to judicial independence in China. However, public opinion could indirectly cause pressure on courts if it raises the concern of leaders of the CPC or the state and subsequently cause their intervention, which might make the situation of judicial independence and impartiality even graver.

In the second part, it is established that sometimes Chinese courts might attempt to construct and take advantage of public opinion to persuade the parties better or push them to accept a decision. This raises the issue to what extent public opinion could be moulded by the state. Chinese courts or the state might also attempt to construct public opinion through show trials in the name of a public trial, which will be discussed in Chapter 4. Litigants might also try to manipulate public opinion to create pressure for a result favouring them.[544] The Chinese media's role on this issue will be developed in Chapter 5.

Although this chapter has discussed the problems of public participation in China, many Chinese scholars still have attempted to justify it by their interpretations of the common law jury trial. They argued that as a symbol of judicial democracy, an advantage of the jury system is "to provide institutional support for the influence of the people's opinions in criminal trial and at the same time to preserve the interactive relationship between the mainstream values of the society and adjudication".[545] A critique of this approach and the deviated substance of "democratic values" of the justice system will be

[544] Liebman, 'Restricted Reform', p. 633.

developed in Chapter 6 from a comparative perspective, by comparing jury trials in common law jurisdictions, mainly in England, and public participation in China which has been discussed in this chapter. Its aim is to further defend the idea that public participation does not automatically assume democratic values or could be the substitute of an independent judiciary to improve public confidence.

[545] Wang, 'Neither Donkey nor Horse', p. 17.

CHAPTER FOUR

OPEN JUSTICE, SHOW TRIALS AND PUBLIC OPINION: WHAT TO DO ABOUT A CRISIS OF PUBLIC CONFIDENCE?

Introduction

In the previous chapter, it is established that the People's Assessors (PAs) are not representative of the Chinese public, although an original aim of this institutions is to introduce public opinion into adjudication in an organized way. It is also established that the recent experiment of the People's Jury in a number of Chinese courts sometimes becomes a strategy to construct and take advantage of public opinion to allay a crisis of public confidence. However, the PAs only sit in a small percentage of cases, and the People's Jury only remains an experiment for limited cases in several courts in China. Therefore, further evidence is needed as to whether the state attempts to influence or take advantage of public opinion to tackle the crisis of public confidence. As a core concept of this thesis, the concept of public opinion will be analysed in different contexts with details in this chapter, in order to provide a more in-depth understanding of the central issue of this thesis. This chapter therefore will discuss whether or not public opinion is skewed by limited transparency and openness of the Chinese justice system, and whether public opinion is influenced or moulded intentionally by the state to improve public confidence. However, if so, one might ask, so what? If intense public opinion or public criticism is adverse to judicial impartiality or judicial independence, is it justified to influence, or even control the expressions of public opinion? Could influencing or controlling public opinion possibly improve public confidence? A counter-argument of controlling public opinion is the principle of open justice and public scrutiny. Therefore, before looking at

the concrete issues, the first part of this chapter will discuss relevant normative issues regarding open justice and public scrutiny as the foundation of a further critique of China.

In the second part, this chapter will analyse transparency of China's justice system against the principle of open justice which is discussed in the first part. Given a transparent justice system and free media, public trials are major information sources for the media and thus the public. Otherwise, public opinion might be skewed by limited reliable information resources. If the transparency seriously falls behind the criteria of the rule of law or it is perceived to be seriously problematic or both, it might be responsible for a crisis of public confidence and intense public criticism. If a lack of transparency is merely a misconception of the public, it is a problem of image, which could be dealt with by providing more information and reducing public misunderstanding. However, it might not be merely a problem of image if transparency actually falls behind what open justice requires. Under such circumstances, the counter-measure would be improvement of the system rather than improvement of public understanding of the facts, which is very likely to be the case of China. This chapter will develop this argument in the second part. Also, if the state attempts to manipulate public opinion by controlling what the public can know, will the public just passively accept this? This question will be answered at the end of the second part.

Publicity does not necessarily indicate open justice or fair trials, e.g. show trials in the former Solvent Union are well-known examples. In China, the features of show trials include but might not be limited to trials where the decisions were already taken beforehand. Generally show trials are arranged to influence public opinion for certain purpose, e.g. to build up or enhance the perceived legitimacy, to implement a certain policy, better governance, popular moral values etc. This section will discuss details and the nature of show trials through several examples, and analyse how they are arranged to influence public opinion, the effect, the nuance within this process, and the concerns that it might raise. Arguments, in this part, will be developed by looking for an answer to the question whether or not show trials could improve public confidence in mainland China. As the educative function of public trials is stressed in China, which is also a part of public legal education policy and legal propaganda, the study of show trials will be developed against this background.

Based on what have been discussed in this chapter, the main findings will be summarized at the end. As the media constitute an important information resource, and are likely to have an impact on public opinion, they might be used by the judicial authority or the state to influence or construct public opinion, given the fact that the media are not independent and free in China, a point which will be developed in the next chapter.

4.1 Open Justice, Public Scrutiny and Public Confidence

4.1.1 Defending Open Justice through Public Scrutiny? A Critique of the Conventional Approach

Open justice in its essential interpretation refers to four elements: first, adequate facilities for attendance at the trial, and at the same time there should be no "unnecessary" barriers;[546] secondly, judgments and other documents of the case should be accessible to the public; thirdly, judges should give reasons for their decisions and judgments should be well reasoned; fourthly, the right of the attendees, mainly the media, to report and the right of the public to scrutinise the case are not infringed, although it is subject to justifiable restrictions specified by the law of defamation and contempt of court. The first element concerns accessibility of public trials and information rather than the actual attendance of members of the general public. Judges should not take action to increase the audience, as stated by the Judicial Committee of the Privy Council in *McPherson v. McPherson*:

> the actual presence of the public is never of course necessary... the Court must be open to any who may present themselves for admission. The remoteness of the possibility of any public attendance must be never by judicial action be reduced to the certainty that there will be none.[547]

However, if there is an audience in the public gallery but they are all arranged intentionally, this trial does not fit into the category of open justice. The second and third elements are also to hold judges accountable and also provide the public with knowledge for their scrutiny of the judiciary. These are the criteria that China's situation will be tested against in the later sections.

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[546] Anthony Duff *et al.*, *The trial on trial: Volume 3 Towards a Normative Theory of the Criminal Trial* (Hart Publishing 2007) p.276.
[547] *McPherson v McPherson* [1936] AC 177, 200.

The principle of open justice should be generally followed unless not doing so is justified in the interests of justice especially in criminal justice. Even if a case has to be heard in camera, as Duff *et al.* argue, the decision of not having a public hearing should be subject to public scrutiny or challenge from members of the public.[548] An indispensible aspect but not all content of the principle of open justice is the public trial, whose importance is indicated by Lord Atkinson in *Scott v. Scott*: "in public trial is to be found, on the whole the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect".[549] Public trial as a fundamental principle is also recognized in other common law cases and also provided by the *European Convention on Human Rights*.[550] However, open justice and public trials are different. Publicity does not necessarily indicate open justice e.g. show trials. Justifications of open justice through e.g. public trials and public scrutiny will now be examined in more detail.

The conventional justification for open justice is that openness ensures the judicial process is subject to public scrutiny and the judiciary are held accountable; therefore, it ensures that justice is not only done but it is seen to be done and maintains public confidence in the justice system. Pragmatic defences for the values of publicity are also argued by scholars. For example, Jeremy Bentham argues that witnesses are more likely to give honest testimony in an open court.[551] Publicity encourages effective performance of the trial court, and protects rights of "both the public and those subject to the enforcement powers of the criminal justice system".[552] In criminal justice, it is also argued that publicity averts "the infiltration of bias on the part of the judge" in the sentencing process.[553] China's attitude towards the principle of open justice is pragmatic. For example, the effect of building up image and authority,[554] and the possible educative effect of open justice, i.e. informing the public about law and legal procedures through

[548] Duff *et al.*, *Trial Volume 3*, p.281.
[549] *Scott v Scott* [1913] AC 417 (HL) 463.
[550] Article 6 (1), The European Convention on Human Rights.
[551] Jeremy Bentham, *Rationale of Judicial Evidence Vol. I*, in David S. Berkowitz and Samuel E. Thorne (eds), Classics of English Legal History in the Modern Era (Garland 1978), p. 522-523.
[552] Matthew Simpson, 'Open Justice and the English Criminal Process' (PhD Thesis, University of Nottingham, 2007), p. 3-4.
[553] Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002) p. 49.

public trials, is stressed a lot in China.[555] In criminal justice, the SPC asserts that open justice can "prompt the defendant to admit his or her guilt",[556] although no evidence is provided to prove this.

However, publicity on its own does not constitute a solid justification for open justice. Public trials are not necessarily fair trials and cannot always ensure impartiality and fairness, e.g. show trials with extreme publicity. Jaconelli also gives an example that in a public hearing the parties are deprived of the right to make representations when he distinguishes open justice from natural justice.[557] The pragmatic explanations of values of open justice are not free from challenge. Jaconelli argues that examination in an open court might have a negative impact on sensitive witnesses due to the fear of reprisals.[558] Jaconelli also argues that "many of the benefits that were claimed for publicity by Jeremy Bentham are supplied nowadays by means other than public scrutiny of trial proceedings", e.g. lawyers' assistance.[559] The educative effect and the immediate public scrutiny depend on the actual attendance of the public, which is restricted by the space of courtroom and the ordinary people's interest and availability.

The argument of Duff *et al.* on the defendant's right to a public trial might inspire a stronger defence of publicity in criminal justice. Duff *et al.* argue that if convictions are regarded as public condemnations, in the name of the public, then the public has a right to speak out about whether or not this condemnation is justified by the verdict and the proceedings.[560] Therefore, public trials cannot be refused by the accused even if they prefer a secret hearing to preserve anonymity (excluding juvenile trials).[561] Furthermore, they argue that the values of public trials should not only be established for instrumental

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[554] SPC, *Several Opinions on Improving Open Justice of the People's Courts by the Supreme People's Court* (最高人民法院关于加强人民法院审判公开工作的若干意见), Document Number [2007] No. 20 (法发〔2007〕20 号), June 4th 2007.
[555] E.g. SPC, *The Announcement of Intensification of the Trials of Serious Accident Cases and Preserve the Social Stability by the SPC* (最高人民法院关于加大对涉及重大公共安全事故等案件的审判力度全力维护社会稳定的通知), Document Number [2004] No. 107 (法[2004]107 号), June 4th 2004.
[556] SPC, *Several Suggestions on Bringing the Criminal Trial into Full Play and Impelling Resolution of Social Conflicts of the SPC* (关于充分发挥刑事审判职能作用深入推进社会矛盾化解的若干意见), Document Number [2010] No. 63 (法发〔2010〕63 号), December 13th 2010, Suggestion 3.
[557] Jaconelli, *Open Justice*, p. 33.
[558] ibid, p. 38.
[559] Joseph Jaconelli, 'Rights Theories and Public Trial', *Journal of Applied Philosophy*, Vol. 14, No. 2, 1997, p. 172.
[560] Duff *et al.*, *Trial Volume 3*, p. 268-269.
[561] ibid, p. 280.

reasons, but also as “a trial in which justice is not seen to be done cannot properly be said to be just”, and the defendant’s right to a public trial should be seen as a right to have their trial subject to public scrutiny. [562]

If open justice is defended through public scrutiny, irrespective of the defendant’s right to public scrutiny or the public’s right to scrutinise a trial, it recognizes another confrontation apart from the one between parties. As Jaconelli argues, “the core of open justice was identified as ... the provision of facilities for the confrontation – between the public and the press on the one side and the participants in the trial on the other”.[563] However, a strong challenge to the justification of open justice which is based on public scrutiny is: public criticism or public pressure might compromise judicial impartiality and independence and lead to unfairness, which is established in Chapter 1 and 2. For example, a retired judge of the Court of Appeal of Australia admitted that: "Judges do respond to public statement and public criticism. It's probably due to an unconscious desire, by judges, to avoid more criticism."[564] Also, Hughes argues that public pressure can “provide support for executive or legislative actions that threaten judicial independence and the integrity of the judicial system”.[565] Therefore, as Duff *et al.* argued, “the argument for public scrutiny, insofar as it is persuasive at all, seems to be an argument in favour of requiring impartial public observers rather than the right to a public trial”.[566]

The public are rarely regarded to be impartial observers by scholars. A common criticism of public opinion is its punitiveness. However, the public are not universally punitive. It might depend on what kind of crime and how the public perceive it against their values in a particular social context. Similar crimes might receive quite different reactions from the public from different cultural backgrounds, e.g. the mild reaction from the Norwegian public to the mass-murderer Anders Behring Breivik.[567] Nor is the

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[562] ibid, p. 270.
[563] Jaconelli, *Open Justice*, p. 10.
[564] Marissa Calligeros, ‘Retired Judge Bows to Public Opinion’ (*Brisbane Times*, February 11th 2010) <http://www.brisbanetimes.com.au/queensland/retired-judge-bows-to-public-opinion-20100210-nsep.html > accessed September 19th 2012.
[565] Patricia Hughes, ‘The Significance of Public Pressure on Judicial Independence’ in Adam Dodek and Lorne Sossin (eds), *Judicial Independence in Context* (Irwin Law Canada 2010) p. 276.
[566] Duff *et al.*, *Trial Volume 3*, p. 266.
[567] Mark Lewis, ‘Why Norway Is Satisfied with Breivik’s Sentence’ (*Time*, August 27th 2012) <http://world.time.com/2012/08/27/why-norway-is-satisfied-with-breiviks-sentence/> accessed March 25th 2014.

public's lack of understanding of the importance of judicial independence and impartiality universally held, e.g. the public of the Netherlands. In the Netherlands, most members of the public approve that the judges should defend their independence rather than bow to the public even if there is an outrage.[568] They are not as punitive as they might be imagined to be, as in a survey, while the respondents gave more severe punishments than judges do but they did not break the upper limits of the law without being told the limits, and most of them have no intention of introducing lay participation to achieve heavier sentences.[569] Culture does not only influence attitudes towards crime and punishment, but also various issues with regard to the justice system, even within the same ethnic group. For example, Hong Kong retains its Chinese culture but is also influenced by British culture as it had been colonized by the British for over a century. In an empirical study, students from Hong Kong raised their concern about an open trial's impact on the privacy of the defendant, while this issue was not raised by the students from mainland China at all.[570] Therefore, Klijn and Croes suggest that "the most desirable reaction from the judiciary would be to convert the complaints of the public into strategies to improve their own functioning and, no less importantly, to successfully communicate with the public about what they are doing and why".[571]

This thesis also argues that even within the same culture, it needs to be very careful about giving an overall or generalized judgment about whether or not the public is punitive or biased. It might over-simplify the fact, as the public in itself is comprehensive and the opinions to the same issue are of great diversity and changeability. Attitudes towards different concrete issues, e.g. punishments to different crimes, also vary. For example, a study finds out that "when the public responds punitively to general questions, they actually want harsh punishment only for the extremely serious violent offenders".[572] This might apply to the same social-demographic group and an example is Chinese students' attitude towards the death penalty. An empirical study finds that: although there

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[568] Albert Klijn and Marnix Croes, 'Public Opinion on Lay Participation in the Criminal Justice System of the Netherlands', *Utrecht Law Review*, Vol. 3, Iss. 2, 2007, p. 160-161, 163-164.
[569] ibid, p. 160, 168.
[570] Hua Zhong, Ming Hu, and Bin Liang, 'Public Opinions on Criminal Trials in China: A Comparative Study of Chinese College Students in the PRC and Hong Kong', *Asian Journal of Criminology*, Vol. 6, Iss. 2, 2011, p. 203.
[571] Klijn and Croes, 'Lay Participation Netherlands', p. 168.
[572] Loretta J. Stalans, 'Measuring Attitudes to Sentencing' in Julian V. Roberts and Mike Hough (eds), *Changing Attitudes to Punishment* (Willan Publishing 2002), p. 24.

is a general strong support of the death penalty, the support to different crimes varies; e.g. the support to the death penalty's application in murder and terrorism cases is very high – over 80% participant students approves, while more than 80% participant students are against the death penalty's application in robbery, currency counterfeiting, and theft cases.[573] Several high profile cases can also provide evidence for the volatility of attitudes towards different crimes or similar crimes of difference circumstances. For example, there are several high profile cases of demonstrated public outrage, e.g. the Chinese public's discontent of the sentence that Liu Yong received on appeal, as discussed in Chapter 1. There are also high profile cases where there is a strong voice from the public stating the punishment is over-harsh, e.g. Xu Ting's case, by comparing the penalty of some corrupt politicians and questioning the gap in sentencing between bureaucrats and ordinary people, as discussed in Chapter 1; or cases where there are voices from the general public against the application of the death penalty, e.g. in the case where six policemen were killed and four were injured by a man called Yang Jia, the public showed sympathy towards the murderer , as discussed in Chapter 1, and they were suspicious of whether or not he had been unfairly treated or assaulted by the police before and whether or not he had a fair trial which will be further analysed as an example of show trials in the last part of this chapter. In the fund-raising fraud case of Wu Ying, voices against the application of the death penalty from the Chinese public became increasingly strong after the accused reported that several government officials took bribes from her, associated with the public's suspicion about whether the local government would attempt to silence her by execution and grapevine news that several government officials wrote letters to the court requesting executing Wu Ying, although they were denied by one of the judges of appeal.[574] These cases suggest that understanding the general public's attitude towards a certain crime – punitive or not -- should be considered in the context of how the Chinese public perceive corruption and social injustice against their values in China. Therefore, it is far from the truth if one simply asserts that the public is punitive or not punitive. It might

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[573] Shenghui Qi and Dietrich Oberwittler, 'On the Road to the Rule of Law: Crime, Crime Control, and Public Opinion in China', *European Journal on Criminal Policy and Research*, Vol. 15, Iss. 1-2, 2009, p. 149.

[574] Dong Bishui, 'The HPC of Zhejiang Province: Sentencing Wu Ying to Death is in Accordance with the Law and Death Penalty Policy' (浙江省高级人民法院：判处吴英死刑符合我国法律和死刑政策), *China Youth Daily*, February 8th 2012, p. 3.

bring more insight by a discussion on who is punitive or not punitive to what, in what social or culture context, and why.

In Wu Ying's case, there are not only criticisms from the general public. A number of well-known Chinese economists, legal scholars and private entrepreneurs also criticised the sentence and even questioned whether or not it should be criminalised and punished, associated with their criticism of the problems of China's financial system, their concerns about this case's effect on non-bank financing and debiting and private enterprises and their wish for a reform of China's financial system.[575] However, it is doubtful how far these technical financial issues might be within ordinary people's understanding and concern and whether or not "public opinion" actually refers to the elites' concern. Some Chinese scholars also call for a reform of the death penalty by resorting to "public opinion" that the Chinese public has achieved a consensus that death penalty's application in non-violence crime should be abolished, however, they did not give any evidence or explain how they measured public opinion on this issue.[576] (Available evidence of this issue is contradictory.) Under these circumstances, it raises the questions about who is creating "public opinion" in high profile cases; whether or not public opinion in this context actually refers to creating perceived public pressure for purposes of e.g. negotiating with the authority for a potential reform etc.; and whether or not "public opinion" might be moulded or dominated by elites for their interests, and if so it raises a concern about how following this kind of "public opinion" might affect those most disadvantaged social groups who are not able to make them heard and remain forgotten.

Even with efforts to discover what the public are actually thinking about, the ways of conducting surveys, e.g. the wording of questions, might also have an effect on how punitive the public appears to be before the scholarship.[577] The public might not be punitive as much as they appear to be. Almond and Colover find that in the UK, great

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[575] Yu Jingping and Peng Zuowen, 'An Analysis of Public Opinion on the Funding-Raising Fraud Case of Wu Ying in Zhejiang' (浙江吴英集资诈骗案舆情分析), *China Economic Times*, February 3rd 2012, p. A11.

[576] Zhang Ran, Yu Jingjing and Qiu Lihua, 'Zhejiang Wuying's Case Exposed Urgency of Financial Reform It Triggered Public Opinion' (浙江"吴英案"凸显金融改革急迫性 引发社会舆论关注) (*Xinhua*, February 7th 2012) <http://news.xinhuanet.com/yuqing/2012-02/07/c_122666432.htm> accessed May 3rd 2014.

[577] Brandon K. Applegate and Joseph B. Sanborn, 'Public Opinion on the Harshness of Local Courts An Experimental Test of Question Wording Effects', *Criminal Justice Review*, Vol. 36, No. 4, 2011, p. 494.

public concern of certain type of cases, e.g. work-related fatality cases, does not indicate a punitive attitude, as "criminal law is valued for its function as a route to securing moral accountability rather than because of its 'punitive' effects and character".[578] They, therefore, argue that criminalisation is not always necessary in every jurisdiction if there are alternatives to fulfil public expectations, e.g. "stronger and more meaningful regulation".[579] This thesis agrees so, however, it does not argue that judges should detect what the public thinks about a particular case and bow to the opinion of any particular members of the general public merely to avoid possible criticism.

Under these circumstances, judges should not be over obsessed about public opinion, as established in Chapter 2. Different opinions on the same case are quite normal. Judges sitting in a trial might have different opinions as they are best informed. And both laymen and judges might change their sentencing of the same case in a different decision-making context.[580] With regard to the possible influence of public opinion on the judiciary, the scholarship should not ignore that their scholarly opinions also influence the judiciary's preference in particular kinds of cases. For example, Hughes found that in the last twenty five years in Canada, due to criticism of judicial activism, the judiciary became increasingly conservative.[581] If the public should be criticised merely because of public opinion's influence on the judiciary, the scholarship might also have to justify itself.

One might argue that the legitimate influence and illegitimate influence should be distinguished and the criticism of the public might constitute illegitimate pressure or influence on judges. However, the boundary between legitimate criticism and illegitimate criticism is not always clear due to the ambiguous nature of legitimacy and the unavailability of generally accepted explicit and applicable criterion. Although public scrutiny is not always perceived to be promising, open justice as a fundamental principle should not be compromised so as to avoid reduction of public confidence, as an Australian judge suggests that public confidence runs low in Australia and is partly caused by a lack of transparency within the judicial system;[582] neither is it justified to prohibit the public from scrutiny. Apart from its utilities, open justice could be justified by the citizens' right

[578] Paul Almond and Sarah Colover, 'Mediating Punitiveness: Understanding Public Attitudes towards Work-Related Fatality Cases', *European Journal of Criminology*, Vol. 7, No. 5, 2010, p. 335-336.
[579] ibid, p. 336.
[580] Stalans, 'Measuring Attitudes', p. 25.
[581] Hughes, 'Significance of Public Pressure', p. 282-283.

to know. Law should be ascertainable to the public, which is one of Fuller's principles of legality.[583] It is to give citizens instructions about their behaviour and the public can also base their scrutiny on knowledge rather than ignorance.[584] In common law countries, precedent constitutes an important source of law, therefore, it becomes necessary to maintain judgments accessible to the public. In China, although judges do not have power to make law, they can interpret law when law is not clear enough. Therefore, judgments, especially judgments of the cases of great public importance, can give citizens further and clearer instructions and inform law better and the public have a right to know.

Besides, open justice indicates it is open to public scrutiny, as the public have a right to scrutinise which is supported by freedom of speech as a fundamental human right. This thesis does not deny that this freedom should be subject to the law of contempt of court in order to ensure the right to a fair trial. There should be and there are measures to restrict of freedom of speech under some circumstances, e.g. a court might issue an injunction to restrict reporting of a particular case. However, this thesis argues that an indispensible premise of such restriction is that the court which has power to do so must be independent and impartial. Otherwise, the law of contempt of court or any restriction of this kind might become a practical tool of suppression. However, much Chinese literature ignores this condition when discussing the necessity and methods to restrict the freedom of speech. Therefore, it should also be very cautious of any attempt to direct or manage public opinion in China. This argument will be developed in this chapter when critically analyzing the situation of judicial independence in China and the next chapter when discussing censorship of the media and the internet.

In western countries, "attempts to manage public opinion are often seen, but little effort is directed to informing or consulting the public in a rational way".[585] Politicians sometimes "can also be more proactive in exploiting public misunderstanding about any given issue in order to develop electoral support", e.g. promise to take "tough and decisive action" against crime.[586] However, whether a more punitive penal policy or criminal law

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[582] Calligeros, 'Retired Judge'.
[583] Lon Fuller, *The Morality of Law* (Yale University Press 1964) p. 39.
[584] Matthew H. Kramer, *Objectivity and the Rule of Law* (Cambridge University Press 2007) p. 151.
[585] Julian V. Roberts and Mike Hough, 'Public Attitudes to Punishment: The Context' in Julian V. Roberts and Mike Hough (eds), *Changing Attitudes to Punishment* (Willan Publishing 2002), p. 1.
[586] David Indermaur and Mike Hough, 'Strategies for Changing Public Attitudes to Punishment' in Julian V. Roberts and Mike Hough (eds), *Changing Attitudes to Punishment* (Willan Publishing 2002), p. 199.

will receive public support is uncertain. For example, in the UK, people report little knowledge of prison, or some of them underestimate life in prison; however, they have no intention to make prison life harder just for the sake of punishment, as they perceive rehabilitation is more important, although whether prison can effectively rehabilitate criminals is questionable.[587] By addressing this issue, this thesis is not intended to criticise the responsiveness of politicians as it is expected by a representative democracy to some extent. However, it is wrong to take advantage of public misconceptions only for the sake of being popular or getting votes. Unlike the political parties in the west, the CPC is always the party in power and it does not need to respond to public opinion to win elections. Nonetheless, it still needs to appeal to public opinion and public confidence to maintain its perceived legitimacy and public support, as the CPC states it represents the overwhelming majority of the Chinese people on which is based its legitimacy. The example of the new litigation fees act might give more understanding of what public opinion might suggest in China.

The act is drafted and enacted by the State Council. The background, as explained by the Legislative Affairs Office of the State Council (LAOSC), is that there was a strong public concern that people cannot get access to justice due to cost, and the new act is "a major good event" to the people as the new act has reduced litigation fees.[588] However, this new act has caused problems to many primary courts: shortage of funding became worse and litigation fees cannot even cover the cost of the court e.g. labour disputes cases only charge RMB 10 (equals about £1), caseload increased and efficiency was affected especially where there were already great tension between limited number of judges and heavy caseload,[589] to name a few. It could be expected that the parties would also be affected by this. Moreover, another major problem of the accessibility to justice is that: the Chinese courts are reluctant to take sensitive cases or the cases which might have a great impact on social stability, e.g. the HPC of Guangxi province circulated a document to inform the local courts to stop dealing with 13 kinds of cases which "involve a wide range

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587 Julian Roberts and Mike Hough, 'The State of the Prisons: Exploring Public Knowledge and Opinion', *The Howard Journal of Criminal Justice*, Vol. 44, No. 3, 2005.

588 Li Li, 'The Legislative Affairs Office of the State Council: Why *The Litigation Fees Payment Act* is Made by Us' (国务院法制办：诉讼费交纳办法为何由我们制定) (*Xinhua*, January 9th 2007) <http://news.xinhuanet.com/legal/2007-01/09/content_5581732.htm> accessed May 13th 2014.

589 Liao Yong'an, 'A Critique of *the Litigation Fees Payment Act*' (《诉讼费用交纳办法》之检讨), *Studies in Law and Business*, No. 2, 2008, p. 151-152.

of issues, great sensitivity, public attention and should be handled by the government or other relevant departments".[590] This problem could hardly be solved merely by a new act reducing litigation fees. Whether or not this new act can distract public attention from the real problem of accessibility to justice is still uncertain.

This example suggests that in a certain context of China, e.g. when discussing measures taken by the authority to deal with public concern or public opinion, public opinion might be what it is perceived to be or interpreted by the authority rather than what it actually is, and when the authority talks about dealing with public opinion they might refer to the attempt to increase public confidence. Therefore, it becomes a concern if the CPC or its government has unrestricted or little-restricted power to interpret public opinion or the best interests of the people that it announces to represent; although democratic responsiveness to public opinion is not free from defects. In order to improve public confidence, there might be more options than responsiveness or populism: influencing public opinion or even controlling the expressions of public opinion e.g. through legal propaganda, show trials, or/and media (both commercialized media and propaganda media), or distracting public attention from the real problems, which will be developed later in this chapter and further in the next chapter.

In consideration of utility, directing or controlling public opinion might not be the best possible option, as public opinion might be a message of social problems or a possible reform etc. Public criticism expressed within the high profile cases might come from those who "believe they have been displaced and forgotten by changes that have occurred, who see the inclusion of those previously excluded as a threat to their place in the society".[591] Under these circumstances, even if a case is closed, debate might still continue outside the courtroom. This argument applies to China, as great social transformation is still in process and has caused a lot of social problems and grievances, which are reflected in several high profile cases, which is established in Chapter 1 and will be further developed by the analysis of a high profile case in the third section. In this regard, public scrutiny might have possible effects on legal and social development, if openness of information and reliable information resources of e.g. the justice system is

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[590] Gan Bin, 'Why the HPC of Guangxi Temporarily Does not Take "13 Types of Cases"' (广西高院为何暂不受理"13 类案件") (*China Youth Daily*, August 24th 2004) <http://zqb.cyol.com/gb/zqb/2004-08/24/content_935227.htm> accessed December 1st 2012.

provided. But to come back to a key term of this chapter – public confidence: does more information necessarily improve public confidence? This will be discussed in the next sub-section.

4.1.2 Information, Public Opinion and Public Confidence: Does a Better Informed Public Indicate Higher Public Confidence?

From time to time, the public are criticised for being ill-informed and their opinion is thereby assumed to have a negative impact on the justice system. Public misunderstanding is also blamed for being responsible for the problems of public confidence towards the justice system. For example, research published by the Home Office of the UK in 2000 suggests that "public ignorance about the justice system would act as a considerable constraint on attempts to rebuild public confidence in it".[592] Information correlates with public attitudes towards the justice system but the correlation is not very clear.[593] Some studies find that a lack of knowledge about the law and the justice system might have a negative impact on public confidence. For example, a study on Switzerland finds that "the public attitudes towards punishment vary according the degree of knowledge of the criminal justice system; the more ignorant of the judiciary, the more punitive people are".[594] A study on public opinion and sentencing in England and Wales has similar findings. In England, judges must follow sentencing guidelines unless it is against the interests of justice to do so. This study finds that the public in England and Wales are ill-informed about the sentencing guidelines and the degree of lay participation in sentencing, and public confidence would improve if they are better informed of the sentencing process.[595]

As "when citizens have been asked about the justice system in general, they have usually thought first about judges in criminal cases",[596] improvement of public confidence

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[591] Hughes, 'Significance of Public Pressure', p. 262.
[592] Catriona Mirrless-Black, 'Improving Public Knowledge about Crime and Punishment' in Julian V. Roberts and Mike Hough (eds), *Changing Attitudes to Punishment* (Willan Publishing 2002), p. 184.
[593] Carole Wilson, 'The Public and The Justice System: Attitudes, Drivers and Behaviour A literature Review' (2012) Scottish Government Social Research, <http://www.scotland.gov.uk/Resource/0039/00396342.pdf> accessed May 3rd 2014, p. 2, 55.
[594] Andre Kuhn, 'Public and Judicial Attitudes to Punishment in Switzerland' in Julian V. Roberts and Mike Hough (eds), *Changing Attitudes to Punishment* (Willan Publishing 2002), p. 124.
[595] Julian Roberts *et al*., 'Effects of Information', p. 1086.
[596] Steven Van de Walle and John W. Raine, *Explaining Attitudes towards the Justice System in the UK and Europe* (Ministry of Justice Research Series 9/08, 2008), p. 46.

in sentencing could be expected to have a significant impact on the improvement of public confidence in the justice system. Efforts are taken to improve the public's awareness of sentencing guidelines and understanding of sentencing in England and Wales. The Sentencing Council states that one of their functions is "promoting awareness amongst the public regarding the realities of sentencing".[597] And before issuing a particular guideline, the Sentencing Council would consult the public and "commissioned independent empirical research to test public opinion", in order to ensure that the "proposals would be based on a clear understanding of the views of the public".[598] An explanation might be, as Roberts and Hough argue, that "engaging the public in discussions about criminal justice will have a salutary effect upon public confidence, independent of whether these discussions achieve a significant increase in public knowledge and criminal justice", due to a finding in the international literature that judges and the justice system are perceived to be out of touch with the general public.[599] In this context, what the sentencing council is doing probably is not to introduce public opinion to sentencing guidelines, as it is very difficult given the fact that the public consists of different social demographic groups and their opinions vary. More likely, the attempt of the sentencing council is to improve public confidence and the role of the sentencing council is stated as "work to improve public confidence in sentencing".[600] Therefore, public opinion might refer to public confidence in such context.

Many more elements might also have an impact on the interrelation between information and public opinion, e.g. what kind of information affects the public and why, what kind of group could be affected and what kind of group should be targeted, any other conditions that affect the reception of information etc. For example, the content of information matters, as some evidence suggests that "the more 'surprising' the information, the more it is remembered".[601] It also needs to consider how to reach the least

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[597] Sentencing Council, 'About Us' (*Sentencing Council*, NA) <http://sentencingcouncil.judiciary.gov.uk/about-us.htm> accessed May 3rd 2014.

[598] Sentencing Advisory Panel, *Advice to the Sentencing Guidelines Council Driving Offences – Causing Death by Driving* (Sentencing Guidelines Council 2008), foreword by the chairman.

[599] Julian V. Roberts and Michael. J. Hough, *Understanding Public Attitudes to Criminal Justice* (Open University Press 2005) p. 156-157.

[600] Sentencing Council, *Annual Report and Financial Report 2010/11* (Sentencing Council 2011), p. 5.

[601] Becca Chapman, Catriona Mirrlees-Black and Claire Brawn, *Improving Public Attitudes to the Criminal Justice System: The Impact of Information*' (Home Office Research Study 245 2002), p. 13.

informed people and how to convince them.[602] Target groups need to be identified if not all social-demographic groups are ill-informed. A study finds that a small group of very punitive people might make the public appear very punitive although the majority are not, and therefore dealing with the targeted group could be more effective than engaging the whole public.[603] Also, variable accessibility and open-mindedness of different subgroups of the public also suggest that effective communication with the public needs targeting "key groups".[604] If the target group is identified and knowledge-improving activities are organized, participation rates have an important impact on the effect.[605] Regarding the limits of participation rates of organized activities, Indermaur and Hough's suggestion of providing information to the media "timely and relevantly" is worth considering.[606] Sherman also gives a very interesting point. He argues that in the US "criminal justice failed to use 'celebrity culture' to build trust", e.g. "explain the law in ways that people find entertaining".[607] He explained that electronic media are highly democratized and free-market institutions where celebrity power can be built and used to "foster support for 'decent' styles of criminal justice in both the image and the reality of how the criminal justice system works".[608] However, all the efforts above are based on the answer to a fundamental question: can increased knowledge in itself improve public confidence? Or does a better informed public indicate a better public confidence in the judiciary and the justice system? There is no conclusive answer yet.

Mirrlees-Black employs "a booklet, a seminar and a video" experiment to test whether information helps improve public confidence. She finds that "despite participants attributing their improved confidence to the information they had been given, there was little evidence of a direct statistical link between improved knowledge and confidence", and the participants know the hypothesis of the test and they might try to give more positive responses.[609] There are still participants that continued to have a "low confidence" and "referred mainly to personal experience or remaining concerns about

[602] Julian Roberts *et al.*, 'Effects of Information', p. 1086.
[603] Kuhn, 'Switzerland', p. 124.
[604] Indermaur and Hough, 'Strategies for Changing', p. 208.
[605] Mirrlees-Black, 'Improving Public Knowledge', p. 193.
[606] Indermaur and Hough, 'Strategies for Changing', p. 206-208.
[607] Lawrence W. Sherman, 'Trust and Confidence in Criminal Justice' (2001), National Crime Justice Reference Service <https://www.ncjrs.gov/pdffiles1/nij/189106-1.pdf> accessed October 18th 2012, p. 23.
[608] ibid, p. 31.
[609] Mirrlees-Black, 'Improving Public Knowledge', p. 191-192.

lenient sentences".[610] Being exposed to more diverse information and opinions does not necessarily indicate a significant change of attitudes, e.g. Chinese students of American education background have an even more approving attitude towards the death penalty compared with their peers educated in China, influenced by the cultural belief of the retribution and deterrence purposes of death penalty, soaring crime rates since the economic reforms, and "a general lack of opposition groups to the death penalty in China".[611] One might argue that both China and the US are retentionist countries. Further evidence is provide by another study which finds that most Chinese students of German education background also provide a general approval attitude to the death penalty,[612] while Germany is an abolitionist country. This finding suggests that the belief and understanding of the aims of punishment also has an impact on public opinion. However, a study finds that "receiving information did not change participants' views about sentencing aims and practices very much".[613] Due to the complex impact of information on possible changes of public opinion, although there are correlations between knowledge and changes of public opinion, the evidence available so far cannot suggest a clear relationship between them. Neither changes of public opinion can be solely attributed to better knowledge.[614]

Furthermore, with regard to information's impact on changes of public opinion, "possible mediating factors are the sources of information, trust in those sources, and levels of interest in information",[615] "level of engagement with justice information (both in terms of openness to it, and opportunity to ask questions about it), and the moral context of information."[616] Information resources are found to have an impact on public opinion and their confidence in the criminal justice system.[617] Among the different information sources, "the most important drivers of people's attitudes to the justice system… are

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[610] ibid, p. 191.
[611] Bin Liang *et al*., 'Sources of Variation in Pro-death Penalty Attitudes in China an Exploratory Study of Chinese Students at Home and Abroad', *British Journal of Criminology*, Vol. 46, Iss. 1, 2006, p. 123.
[612] Qi and Oberwittler, 'On the Road', p. 149.
[613] Chapman, Mirrlees-Black and Brawn, 'Improving Public Attitudes', p. 26.
[614] ibid, p. 50.
[615] Wilson, 'literature Review', p. 2, 55-56.
[616] ibid, p. 17.
[617] Chapman, Mirrlees-Black and Brawn, 'Improving Public Attitudes', p. 35.

personal experiences", experiences include both direct experience and hearsay of other people's experience.[618]

Researches on experience with courts and its impact on public confidence challenge a conventional perception: low-level public confidence is attributed to the ill-informed public or their misunderstanding of the justice system. An assumption derived from this perception is that the justice system is far better than the public perceive it to be and public confidence can be improved if the public are better informed. However, empirical findings in this regard are mixed. Increased experience with and knowledge about courts does not always lead to greater confidence. An empirical study of public confidence in the US state courts finds that "respondents who reported a higher knowledge about the courts expressed lower confidence in courts in their community".[619] A French survey also finds that within the people with direct experience of the courts whose assessment of courts changed, the interviewed who developed a more negative assessment are more than the interviewed who developed a better view.[620] However, why and how do experiences affect the public's perceptions and their confidence?

First of all, it might be a bit too vague to discuss public confidence generally. It might bring some insight if the approach is made more specific and detailed to look at public confidence in what part of the justice system changed and the different nature of experiences. Public confidence might include their confidence in the independence of the judiciary, the efficiency of reducing crime, procedural fairness etc. For example, by studying the data of *the British Crime Survey 2005/06*, Van De Walle argues that experience with the criminal justice system generally has a positive effect on evaluations of fairness of the system (apart from the accused) but negative evaluations of efficiency and effectiveness of the system in the UK.[621] Their experiences might be direct contact with the system e.g. jury service, witness, claimant, defendant etc., or hearsay of experiences of their social contacts. For example, another study on court users and

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[618] Wilson, 'literature Review', p. 2, 18, 32, 55-57, 68.
[619] National Centre for State Courts, 'How the Public Views the State Courts', National Conference on Public Trust and Confidence in the Justice System, Washington DC, May 14th 1999, <http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf> accessed October 10th 2012, p.7.
[620] Pache and Fort, *Enquete De Satisfaction Aupres Des Usagers De La Justice* (Satisfaction Survey among the Users of the Justice System) (Mission de recherche Droit et Justice 2001); cited by Steven Van De Walle, 'Confidence in the Criminal Justice System: Does Experience Count', *The British Journal of Criminology*, Vol. 49, Iss. 3, 2009, p. 386.

non-users' perceptions of the courts by Benesh and Howell also found that experience matters, and "those that have more stake and less control (defendants, plaintiffs, victims, and parties to domestic disputes) will have less confidence in the courts than those with a low stake in the case and a high level of control over its outcome (jurors, court employees, and attorneys)", and they therefore suspect that feelings of helplessness and a personal stake can also explain negative reviews.[622] Noticeably, the members of the public are different, but "the background characteristics of the respondent, such as gender, age, education, and the respondent's own assessment of the knowledge of the administration of justice hardly can explain the variation in the degree of the confidence in the judiciary".[623]

The quality of experience plays a significant role. In an empirical study, Tyler found that the primary element of public confidence in courts is not the outcome of cases; rather, it is "how the courts treat members of the public".[624] Tyler finds that procedural fairness matters more, e.g. whether or not they are treated fairly with dignity and respect, and whether or not the courts' staff are neutral and care for their concerns etc., regarding peoples' personal experiences with courts.[625] Sherman also argues that "it is not the fairness or effectiveness of the results of criminal justice that determine its level of public trust; rather, changes in modern culture have made criminal justice procedures and the manners of criminal justice officials far more important to public trust".[626] A counter example is the US. Sherman argues that the decline of confidence in American criminal justice system might be attributed to "the incongruence of hierarchical legal institutions and their long-established procedures in an egalitarian culture" e.g. judges are perceived as "unnecessarily authoritarian" by citizens with experience of the courts.[627] This could support the argument that, if judges simply bow to public opinion in high profile cases, this does not automatically assume improvement of public confidence. In China, various problems in the performance of the justice system contribute to the crisis of public

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[621] Van De Walle, 'Does Experience Count', p. 392.
[622] Sara C. Benesh and Susan E. Howell, 'Confidence in the Courts: a Comparison of Users and Non-users' *Behavioral Sciences and the Law*, Vol. 19, Iss. 2, 2001, p. 209, 212.
[623] Klijn and Croes, 'Lay Participation Netherlands', p. 165.
[624] Tom R. Tyler, 'Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?', *Behavioural Sciences and the Law*, Vol. 19, Iss. 2, 2001, p. 215-217, p. 229.
[625] ibid, p. 223-234.
[626] Lawrence W. Sherman, 'Trust and Confidence in Criminal Justice' (*National Crime Justice Reference Service*, July 2001) <https://www.ncjrs.gov/pdffiles1/nij/189106-1.pdf> last accessed October 18th 2012.
[627] ibid.

confidence, e.g. a lack of judicial independence which is established in the previous chapter, and a lack of openness of the justice system which will be developed in the next part of this chapter. And therefore to what extent the campaign of publicizing law would improve public confidence in China's justice system is questionable. These findings also bring some insight to two questions: firstly, are judges to blame for the problem of public confidence? Secondly, what can judges do to improve public confidence?

A public opinion survey might reveal some perceptions of the public towards the justice system and judges; however, it does not always indicate clearly whether or not they perceive judges are responsible for the perceived problems.[628] It is not entirely beyond judges' ability to improve court user's experience, e.g. treat people with respect and dignity, so as to improve public confidence. Judges should also be aware of the concerns of the community. For example, in England and Wales, most people have a positive attitude towards magistrates with regard to sentencing, as they perceive that magistrates are more in touch with the community than judges and share the same values with the public.[629] Their justification for using magistrates is the same as their justification for using juries, i.e. "people get tried by their peers", regardless whether magistrates are more or less lenient than judges on average.[630] Another example is the Netherlands. The Dutch prefer professional judges to lay participation in sentencing, as they perceive the administration of justice is a professional matter and at the same time they do not perceive judges are seriously irresponsive or out of touch.[631]

However, not everyone has experiences with the courts, and experience is highly personal and might be inaccurate or biased. Apart from experiences, public opinion and public confidence is also affected by various elements which might not be accurate or reliable, e.g. "Other drivers, such as the media, may come into play when people do not have such direct experience",[632] and even the free-market media might be biased. Even official information resources might have problems, e.g. Anumba argues that

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[628] David B. Rottman and Alan J. Tomkins, 'Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges', *Court Review*, Vol. 36, Iss. 3, 1999, p. 29.
[629] Julian Roberts *et al.*, 'Effects of Information', p. 1080- 1081.
[630] ibid, p. 1081.
[631] Klijn and Croes, 'Lay Participation Netherlands', p. 163-164, 159.
[632] Wilson, 'literature Review', p. 18, 55.

"government reports... may serve political rather than informational purposes".[633] Personal background could also have an impact, e.g. Van de Walle and Raine find that in the UK people's confidence in the legal system increases with education, life satisfaction, interpersonal trust, feelings of safety, interest in politics etc.[634] Attitudes towards other governmental institutions and whether someone belong to a social group discriminated against also affect their confidence.[635] A study in the Netherlands finds that the greater the confidence in the police and the legislature of the criminal justice system, the higher the confidence in the judiciary.[636] Therefore, as Van De Walle argues, "a single minor experience of the court will, in itself, probably have little effect on these entrenched attitudes".[637]

Based on what is discussed above, the positive impact of information on the improvement of public confidence depends on factors including, but not limited to, the following: firstly, the system itself should meet the fundamental standards of the rule of law, e.g. open justice is actually guaranteed in fact, the procedure is fair, the public with direct contact of court is treated with respect and dignity etc.; secondly, information can reach the target groups or the general public if low-levelled knowledge is widespread; thirdly, information resources are reliable and trusted. If reliable and trusted information resources are limited, it would skew public opinion, and changes of information resources might be beyond the ability of the public, which will be discussed in China's context in next section. In addition, if the justice system is problematic in itself, increased information or knowledge can hardly improve public confidence. If this is the case in China, there are two options: improving the justice system or constructing image, which will be discussed in the third part of this chapter.

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[633] Natalie Mayona Anumba, 'Informing the Public: Impact of the Presence and Type of Information Provided on Laypersons' Knowledge and Attitudes Toward the Criminal Justice System' (PhD thesis, Drexel University, 2011) p.14.
[634] Van de Walle and Raine, 'Explaining Attitudes', p. ii, 31.
[635] ibid, p. ii, 27, 31-32.
[636] Klijn and Croes, 'Lay Participation', p. 166.
[637] Van De Walle, 'Does Experience Count', p. 395.

4.2 Open Justice in China: Limited Transparency and Reliable Information Resources Skewed Public Opinion

4.2.1 Openness and Transparency Are Called Into Question

Public trials have been established as a principle in China's constitution so that all cases should be tried in public unless otherwise specified by law.[638] This is also stated clearly in the criminal procedure law,[639] the civil procedure law[640] and the administrative procedure law.[641] The SPC also enacted several regulations and guidelines regarding public trial and other aspects of open justice a few years ago, e.g. *Several Suggestions on Reinforcing Open Justice* in 2007, *Six Regulations on Open Justice* in 2009, and *The Criteria of the Model Courts of Open Justice* in 2010. Other local courts also enacted similar guidelines or regulations, e.g. *Several Regulations on Reinforcing Open Justice* by the HPC of Guangdong province and *The Implementation Criteria of Justice in the Sunlight* by the HPC of Jiangsu province. The principle of open justice is well established on paper in China so far. However, how far is it implemented in practice?

Empirical studies conducted by either Chinese courts or scholars on open justice both acknowledge the progress that has been made and recognize problems that still exist. Chinese courts note that the problems of openness are partly responsible for the crisis of public confidence.[642] A report points out that the problems include: the accessibility of judgments still remains "far from properly done"; procedural transparency remains "considerably low"; there are "all kinds of" barriers to attending public trials; the parties cannot always get access to the documents of their cases; statistics of the justice system "only mention the minor problems but avoid the real serious problems" and some courts even fabricate data; the activities of improving open justice are "excessively dominated by propaganda purposes" etc.[643]

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[638] Article 125, Section 7, Chapter 3, The Constitution of the PRC.
[639] Article 11, Chapter 1, Part 1, The Criminal Procedure Law of the PRC.
[640] Article 10, Chapter 1, Part 1, The Civil Procedure Law of the PRC.
[641] Article 6, Chapter 1, The Administrative Procedure Law of the PRC.
[642] Research Team of the First IPC of Beijing, 'An Survey Report of Increasing the Public Confidence in the People's Courts' (关于加强人民法院司法公信力建设的调研报告), *The People's Judicature*, No. 5, 2011, p. 44.
[643] Institute for Advanced Judicial Studies, 'Annual Report on China's Judicial Reform (2011)' (中国司法改革年度报告(2011)), *Tribune of Political Science and Law*, No. 2, 2012, p. 107.

This thesis argues that China is a massive country of great diversity and uneven development including legal development. The situation and concerns of courts in different areas varies, e.g. what particular kind of problems regarding open justice concern judges, or even whether openness is a major concern to judges, whether or not or to what extent public pressure or the media's pressure associated with public scrutiny concerns judges etc. Generally, openness is proportional to the economic situation of the local area.[644] The actual openness of the justice system in the developed areas is better than in under-developed areas, although both are not free from problems. In less developed areas, the degree of openness is restricted by its inadequate funding or resources of the courts.[645] The shortage of funding has a significant negative impact on the operation of courts, e.g. some primary courts do not even have even enough funding to pay bills to ensure the supply of electricity and the telephone net-work,[646] or pay the judges and staffs' salary;[647] courtrooms are very old and shabby or even dilapidated but the court does not have funding to build new courtrooms etc [648]. The shortage of funding has deteriorated after the new litigation fee act was passed where the litigation charge is largely reduced and even several courts in Guangdong Province – a relatively affluent province in China – started to complain.[649] Under these circumstances, the major concern of these courts is likely to be how to solve the funding problems more than how to

[644] Research Team of the HPC of Guangdong Province, 'A Survey Report on Improving Openness and Public Confidence in the Judicial System' (关于加大司法公开力度提高司法公信力的调研报告) (*Guangdong Courts*, March 20th 2012) <http://www.gdcourts.gov.cn/gdcourt/front/front!content.action?lmdm=LM52&gjid=20120320020520964138> accessed October 4th 2012.

[645] Ye Qing, Zhang Dong and Liu Guannan, 'A Survey Report on the Publicity of Criminal Trials' (刑事审判公开问题实证调研报告), *Legal Science Monthly*, No. 7, 2011, p. 154; Research Team of the HPC of Guangdong Province, 'Improving Openness'.

[646] Peng Jixiang, 'The Situation and Impact of the Funding of the Primary Courts in the Impoverished Areas' (贫困地区基层法院经费保障状况、影响及思考) (*Hunan Courts*, September 29th 2005) <http://hunanfy.chinacourt.org/public/detail.php?id=1845> accessed November 23rd 2012.

[647] Xin He, 'Judicial Finance and Judicial Reform – A Comparison of Two Primary Courts' (司法财政与司法改革——两个基层法院的比较), *China Law*, No. 6, 2009, p. 41.

[648] He Fang, 'A Brief Discussion of the Reform of the Courts' Funding System' (浅谈法院经费保障体制改革) (*Yueyang IPC*, October 11th 2011) <http://hnyyzy.chinacourt.org/article/detail/2011/10/id/926850.shtml> accessed May 3rd 2014.

[649] Research Team of the Judicial Administration Facilities Office of the HPC of Guangdong Province, 'The Survey Report of the Impact of *The Payment Methods of Litigation Fees* on the Funding Situation of the Courts in Our Province' (关于《诉讼费用交纳办法》的实施对我省法院经费保障影响的调研报告) (*Guangdong Courts*, March 23rd 2009) <http://www.gdcourts.gov.cn/gdcourt/front/front!content.action?lmdm=LM53&gjid=21483> accessed November 23rd 2012.

improve the openness of the court or how to deal with on-line public opinion or public pressure, and the dominant concern of funding problems is admitted by several Chinese courts.[650] In contrast, e.g. many courts in Jiangsu Province have set up electronic screens to display information about public hearings, and co-operate with local media regularly to broadcast some trials, publish judgments and case comments.[651] As a result of guaranteed funding for better facilities of openness, a survey finds that it is understandable that the judges from developed areas are more concerned about the pressure brought by media's reporting.[652] Therefore, this suggests that public opinion and the media reporting's potential risk to judicial impartiality and independence might only become a concern when the economic and legal developments achieve a certain level.

Although material and financial guarantee does matter, it is not the only factor affecting the actual openness of the justice system. Problems recognized by Chinese judges vary. In a survey report, nearly a half of respondents -- criminal judges -- suggest that the law about what kind of cases should be tried in public is not clear enough to apply.[653] Although many Chinese judges expressed their awareness of the importance of public trials, they also expressed practical concerns about publicity. For example, Chinese judges are worried that some cases might transmit criminal skills while the trials should be conducted in public according to law; the attendance of an audience might affect their decision making;[654] or witnesses might be concerned about potential retaliation and so be unwilling to give testimony.[655] In fact, the Chinese court's attitude towards the media depends on pragmatic purposes. In terms of propaganda, Chinese courts do not mind co-operating with the media; while in terms of scrutiny by the media, Chinese courts are very reserved due to their concern about the media's bias and potential public pressure.[656] This is evidenced by a principle stated by a HPC that: "courts should actively publicize

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[650] He, 'Brief Discussion of Courts' Funding'.
[651] Research Office of the HPC of Jiangsu Province, 'A Survey on and Thinking about the Operation of Open Justice' (审判公开制度施行情况的实证调查与思考), *Journal of Law Application*, No. 3, 2006, p. 10.
[652] Ye, Zhang and Liu, 'Publicity of Criminal Trials', p. 152.
[653] ibid, p. 150.
[654] ibid, p. 150, 152.
[655] PPC of Haicang District of Xiamen, 'A Survey Report of Innovation of Open Justice Mechanism – based on the Sample of Haicang Court' (关于创新司法公开机制的调研报告——以海沧法院为样本) (*Xiamen Courts*, September 26th 2012) <http://www.xmcourt.gov.cn/pages/ContentView.aspx?CmsList=132&CmsID=200> accessed October 26th 2012.

themselves… and they should improve media's opportunity of reporting and citizens' opportunity to watch public trials while adhering to the principle that giving priority to positive propaganda and leave media's supervision as a supplement".[657]

Although the media's reporting is an important information resource for the public provided that the media has freedom to some degree (the freedom of Chinese media will be discussed in the next chapter), judgments are still the most reliable information sources of cases and a fundamental way of public communication. Chinese courts have acknowledged that judgments should be well reasoned and accessible to the public.[658] Chinese courts have also demonstrated their effort to achieve this. An example is that a lot of Chinese courts started to publish their judgments on the internet, e.g. the HPC of Jiangsu regularly publishes some judgments on the internet;[659] the HPC of Shaanxi requires that every court in Shaanxi Province should publish all of its judgments on the court's website from January 1st, 2010;[660] the HPC of Henan Province also requires that all the courts in the province should publish all judgments on the internet and readers are also able to leave comments on a particular judgment through the website,[661] and it has established a website for the purpose of publishing judgments and other judicial documents of the courts in this province.[662] *Chinacourt.org* also publishes the judgments of different courts all over the country.[663] Up to April 2009, nearly 60,000 judgments were published online,[664] while only in 2009 there are about seven million cases tried in mainland China according to the statistic of the SPC.[665] Therefore, the quantity could still be further improved.

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[656] Research Office of the HPC of Jiangsu Province, 'Open Justice', p. 11.
[657] ibid, p. 12-13.
[658] Ye, Zhang and Liu, 'Publicity of Criminal Trials', p. 157.
[659] Research Office of the HPC of Jiangsu Province, 'Open Justice', p. 10.
[660] Duan Bo, 'Shaanxi: From January 2010 the Judgments of All the Courts of Shaanxi Province will be Published on the Internet' (陕西：2010 年 1 月起全省法院判决书上网公开) (*Xinhua*, December 31st 2009) <http://news.xinhuanet.com/legal/2009-12/31/content_12735905.htm> accessed October 25th 2012.
[661] Chen Haifa and Ji Tianfu, 'All the Courts of the Three Levels in Henan Have Put Judgments on the Internet' (河南三级法院全部实现裁判文书上网), *People's Court Daily*, November 6th 2009, p. 1.
[662] <http://ws.hncourt.org/>.
[663] <http://old.chinacourt.org/html/ajk/more.shtml?location=0409010000>.
[664] Cui Zhenping, 'Nearly 60,000 Binding Judgments are Published on the Internet in China' (全国近 6 万件生效判决书上网公开) (*Chinacourt.org*, April 10th 2009) <http://old.chinacourt.org/html/article/200904/10/352466.shtml> accessed October 25th 2012.
[665] SPC, 'Statistic of Each Kind of Cases Tried by All of the Courts in the Country' (2009 年全国法院审理各类案件情况统计表) (*SPC*, April 8th 2010) <http://www.court.gov.cn/qwfb/sfsj/201004/t20100408_3857.htm> accessed October 25th, 2012.

The most recent and significant event of this kind is: the SPC has enacted *the Regulations on Publishing Judgments on the Internet by the SPC* (in effect from January 1st 2014), which requires that the courts of each level publish their judgments within seven days after they take into effect on a special website (the official English translation on the website is: Judicial Opinions of China)[666] which has been established by the SPC according to this document. However, the judgments which involve state secrets, privacy, youth crime, or the cases which are resolved by mediation, and other documents "which are not suitable to be published on the internet" will not be published on this website.[667] It also clearly states that personal information, commercial secrets and "other information which is not suitable to be open" must be deleted if the judgment to be published contains such content.[668] However, it does not specify what constitutes "not suitable" and it is subject to the discretion of each court, which could still leave the practical possibility for restrictions on openness according to circumstances. This policy could be a response to the CPC's expectations. The Third Plenary Session of the Eighteenth CPC Committee has enacted *Decision of the CCCPC on Some Major Issues Concerning Comprehensively Deepening the Reform*, and it states that "We will increase the persuasiveness of legal instruments and press ahead with publicizing court ruling documents that have come into effect".[669] The construction of this website was started after the CPC organization within the SPC had reviewed and passed the *Report of Establishing the Website of Judicial Opinions of China*.[670] This also suggests that the CPC has a significant influence on China's legal reform, and the CPC perceives public confidence in the justice system to be part of public support of itself through its powerful "leadership" of the justice system.

Apart from the efforts taken to publish more judgments, Chinese courts also have acknowledged the importance of the quality of judgments. In order to encourage judges to improve their reasoning, many Chinese courts organized events to appraise the quality of

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[666] <http://www.court.gov.cn/zgcpwsw/>

[667] SPC, *The Regulations on Publishing Judgments on the Internet by the SPC* (最高人民法院关于人民法院在互联网公布裁判文书的规定), Document Number Judicial Interpretation [2013] No. 26 (法释〔2013〕26 号), in effect from January 1st 2014, Article 4.

[668] ibid, Article 7.

[669] The English translation of this document is available at <http://www.china.org.cn/chinese/2014-01/17/content_31226494_9.htm> accessed March 28th 2014.

[670] Yang Jianwen and Chen Dongsheng, 'The Procedure of the People's Courts Publishing Judgments on the Internet' (人民法院网上公布裁判文书过程揭秘), *Legal Daily*, January 8th 2014, p. 4.

their judgments and select out some well written judgments as model.[671] Some of them even invited lay persons to take part in such events and appraise the quality of judgments.[672] They do not only select out the judgments that are perceived to be good as encouragement, but also select out the judgments that are perceived to fail to meet the standard and circulate them within the court as a warning.[673] Some Chinese courts even asserted that they would provide variable financial rewards to any members of the public who report errors in the judgments e.g. spelling, or even incorrect application of law etc. if they are subsequently confirmed by the court.[674] However, the reason given by the judges in a judgment is not necessarily the real reason or all the reason of the decision.[675] Therefore, whether or not these appraisal campaigns can improve judicial reasoning still remains to be seen.

Apart from taking measures or demonstrating their effort to improve the openness of the justice system, Chinese judges do not forget to blame the public. They criticise that some ordinary people have no idea whether they are permitted to watch a trial and if so how to do that.[676] Several surveys conducted by courts found that a very few people have watched a trial and a major reason for attending a trial is that the people they know e.g. their relatives are involved and it becomes their concern; and they are very critical about this and attributes this to a low democracy consciousness of the Chinese and the selfishness of people that they are indifferent if their interest are not at stake.[677] However, this thesis argues that open justice refers to accessibility of both courtrooms and

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[671] Research Office of the HPC of Jiangsu Province, 'Open Justice', p. 10.

[672] Ying Lijun, 'Ningshan Court Innovates Legal Documents Appraisal Events' (宁陕法院创新法律文书评比活动) (*Ankang Courts*, September 21st 2011) <http://akzy.chinacourt.org/public/detail.php?id=1070> accessed October 25th 2012.

[673] Liu Jun and Lv Lu, 'Yangzhou Three "Key Words" Present a Beautiful Business Card of the Justice System' (扬州 三个"关键词"打造司法亮丽名片), *People's Court Daily*, May 28th 2012, p. 5; Yu Dongming and Wang Jialiang, 'Rizhao Court Selected out the Worst Judicial Documents' (日照法院"勇亮家丑"评选最差裁判文书) (*Legal Daily*, July 6th 2011) <http://www.legaldaily.com.cn/index/content/2011-07/06/content_2784369.htm?node=20908> accessed October 25th 2012.

[674] 'The IPC of Huangshan City Offers Rewards to Encourage Reporting of Errors of Judgments' (黄山市中级人民法院"悬赏"纠错裁判文书) (*Xinhua*, February 24th 2014) <http://news.xinhuanet.com/legal/2014-02/24/c_119477613.htm> accessed March 28th 2014.

[675] Su Li, 'Caution but not Refusal An Obviously Reserved Analysis of Putting All the Judgments on Internet' (谨慎，但不是拒绝 对判决书全部上网的一个显然保守的分析), *Journal of Law Application*, No. 1, 2010, p. 51.

[676] Ye, Zhang and Liu, 'Publicity of Criminal Trials', p. 152.

[677] Research Office of the HPC of Jiangsu Province, 'Open Justice', p. 11.

information rather than the actual attendance of a trial and it is citizens' right rather than duty to attend a public trial. The criticism by the Chinese judges about too small audiences at public trials does not stand, as it is argued in the first part of this chapter that: the problems of openness refer to barriers to attend a trial or to information and the truth rather than the actual number of the audience, and judges should not take action to increase audience size.

In fact, barriers of accessibility are the real problems leading to a lack of transparency in China's justice system, which will be developed later in this part. The Chinese courts' commitment to improve transparency is questionable. A survey report admits that "some courts only open what they want to open rather than what the local people or the parties would like to open".[678] A reason, given by some Chinese judges, is that some other judges take advantage of it for the convenience of "black case work" – exercising power in secret to cover up something unfair or illegal.[679] This report also notes that in some high profile cases, the court might restrict the number of the audience or even arrange for particular people to attend the hearing.[680] If the issues involved might be contentious, in order to avoid criticism or debates, courts would prefer to inform parties only orally without any recording in judicial documents, e.g. if a case will be presented to the adjudication committee.[681] Therefore, the Chinese public have very limited access to information and the truth. The Chinese judicial authority seems aware that the public is not satisfied with the actual transparency of the justice system and has already taken some counter-measures, however, do they work?

Courts all over China are enthusiastic to demonstrate their effort to improve the actual open justice and public confidence, e.g. a lot of court open days are organized,[682] and courts inviting deputies of the local People's Congress and other member of the general public to attend trials is generally practiced and sometimes they even invite administrative leaders of local PLC, members of the procuratorate etc. to attend the

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678 Research Team of the HPC of Guangdong Province, 'Improving Openness'.
679 ibid.
680 ibid.
681 Research Office of the HPC of Jiangsu Province, 'Open Justice', p. 13.
682 HPC of Shanghai, 'Implementation Guidelines of Improving Open Justice of the Courts in Shanghai' (上海法院着力推进司法公开的实施意见) (*Shanghai Courts*, 2011) <http://shfy.chinacourt.org/article/detail/2011/01/id/597099.shtml> accessed May 6th 2014.

deliberation of the collegiate panel "so as to ensure judicial impartiality and openness".[683] However, most of them appear to be done for propaganda purposes and the sincerity behind these measures is therefore called into question. For example, the HPC of Shaanxi Province announced that all the judgments of the courts of this province will be published on the internet; however, not all the judgments finally are published on the internet.[684] Although many Chinese courts have started to broadcast trials (by video or pictures and notes), most of them are very simple and trials are merely conducted according to prior plans.[685] It seems that courts are more interested in building up a better image than improving the actual open justice, which is evidenced by the statements of several courts. For example, a HPC states that courts should "publicize themselves actively".[686] An IPC provides information to the media about its achievements in order to "direct the media's reporting".[687] Another HPC even suggests that propaganda of judges and courts could be done in a more interesting way e.g. play, drama, propaganda film, TV programs etc. so as to create an image of fair, clever, thoughtful judges.[688] It would fall behind the criterion of the rule of law if so many courts are dedicated to selling themselves and ignore the real problems. However, it is difficult to deny that the procedural fairness is more problematic and more miscarriages of justice occurred in the court at that time. Also, it is doubtful that whether or not the image building campaign would save judges from the crisis of public confidence, as there are more obstinate problems within this system, which will be analysed in the next section.

4.2.2 Justice in Secret: Unwritten Rules, the Adjudication Committee, and the Subsidiary Files

The justice system of mainland China still maintains a very strong secrecy feature, which has not significantly changed during these years' judicial reform and is likely to

[683] Jiang Huiling and Hu Xiabing, 'Reforms and Improvement of the Judicial Transparency' (我国司法透明机制的改革和完善), *Journal of Law Application*, No. 3, 2006, p. 4.
[684] Institute for Advanced Judicial Studies, 'Annual Report on China's Judicial Reform (2010)' (the original and full version) <http://justice.fyfz.cn> p. 34; a shorter and revised version is available in *Tribune of Political Science and Law*, Vol. 29, No. 3, 2011, p.133-153.
[685] Wang Qingting, 'Open Justice should be Modest and Ordered' (司法公开要"公而有度，开而有序"), *The People's Judicature*, No. 21, 2011, p. 55.
[686] Research Office of the HPC of Jiangsu Province, 'Open Justice', p. 12.
[687] Liu Fuhua, 'The Sunlight Administration of Justice Project of the First IPC of Chongqing' (重庆一中院的阳光司法工程), *The People's Judicature*, No. 19, 2010, p. 49.

have a negative impact on transparency. This secrecy feature is exemplified by unwritten rules, which are never established formally but extensively practiced and will be discussed in the first section, and institutional defects – judicial secret and the subsidiary files, which will be discussed in the second section.

4.2.2.1 Unwritten Rules: Open Justice Is Eroded

Unwritten rules (*qian guize*) are extensively used within China's justice system, which is also translated as hidden rules or latent rules. They all indicate the informal and secret nature of such rules. Compared with statute, judicial interpretation or any other formal rules, unwritten rules are not established by any formal resources and some of them are even illegal. As McConville notes that "formal rules themselves generate secrete informal organizational practices", which also occurs in other jurisdictions such as England and Wales etc.[689] They are not open to the public or even the parties of cases but are followed by Chinese judges in practice, and they are even more influential to judges than those formal rules. For example, interrogation of corruption cases of high ranking officials is usually started through the CPC internal procedure by the CPC discipline committee who decide whether the case will be passed to the procuratorate and enter into the procedure of criminal justice, which is not provided by any law but has become routine practice.[690] Another example is the practice of torture. Torture is forbidden by Chinese law, however, it is still widely practiced by the police to extract confessions and clues of evidence and many police officers "believed it perfectly legitimate to apply extreme pressure on suspects to confess" out of the concerns of promotion or the pressure of resolving cases involving death within a certain time, and evidence obtained through torture could be admissible at trials and used by judges.[691] The confession of the accused still remains "the king of evidence".[692]

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[688] Research Team of the HPC of Guangdong Province, 'Improving Openness'.
[689] Mike McConville *et al.*, *Criminal Justice in China An Empirical Inquiry* (Edward Elgar Publishing 2011), p. 433.
[690] Song Wei, 'The Mechanism of Punishing High-ranking Officials has Taken shape Serving Imprisonment in Qincheng Prison is "the Last Privilege"' (惩处高官腐败机制形成 秦城监狱服刑成"最后特权") (*CPC News*, December 31st 2007) <http://cpc.people.com.cn/GB/64093/64371/6720302.html> accessed May 6th 2014.
[691] McConville *et al.*, *Criminal Justice in China*, p. 69, 213, 338, 340, 434.
[692] ibid, p. 66.

The practice of unwritten rules is acknowledged both by Chinese scholars[693] and judges[694]. Actually, unwritten rules within the justice system did not just emerge with the contemporary "socialist" legal system, as several Chinese legal history research literatures have studied unwritten rules in the Chinese historical context,[695] but this section will only focus on contemporary China. Unwritten rules are criticised as they might lead to corruption,[696] miscarriages of justice (an example is She Xianglin's case which is discussed in the previous chapter) and thus impaired public confidence. A pragmatic reason for Chinese judges to follow unwritten rules is to cover their backs and avoid potential responsibility, as these rules will not be cited in their judgments, neither are they accessible to the parties or the public. An example is that trial judges might seek instructions from the chief justice of the tribunal, the president of the court, the adjudication committee or the court which might hear the case if the parties appeal, however, judges will not cite the instructions although they follow them.[697] Another example is that judges might discuss cases with the prosecution before the trial to ensure "the facts are clear and the evidence sufficient" in case anything unexpected comes up during trial,[698] although in an attempt to avoid the preconception of judges before trial the criminal procedure law was amended in 1996 so that only photocopies or photos of "major evidence" instead of all evidence (in the criminal procedure law 1979) should be sent to the court by the prosecution.[699] (It was amended again in 2012 so that the prosecution should send all the evidence to the court.)[700] The strong anti-transparency feature of unwritten rules makes them barriers to public scrutiny. The decisions made according to

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[693] Pan Shenming, 'A Study of the Strange Latent Judicial Rules -- A Case Study Based on a Conference Minutes' (the journal's translation) (司法潜规则研究——以会议纪要为例), *Journal of Southwest Jiaotong University (Social Sciences)*, Vol. 4, No. 5, 2003; Zhou Dengliang, 'Research on the Unwritten Rules of Adjudication Committee – Observation of the Resolution of a Civil Dispute' (审判委员会制度的潜规则研究——以一起民事纠纷的解决为考察起点), *Political Science and Law*, No. 6, 2008.

[694] Xia Min, 'Public Confidence in the Judicial System Relies on the Abolishment of Unwritten Rules – From the Perspective of Open Justice of the People's Courts' (司法公信力在于祛除司法潜规则——以人民法院的司法公开为视角), *Forum of the Rule of Law*, No. 1, 2012.

[695] E.g. Zhen Xiaochun, 'A Study on the Corrupt and Unwritten Rules of the Primary Justice System of Qing Dynasty from the Perspective of Litigation Fee Bills of Huizhou' (从徽州讼费账单看清代基层司法的陋规与潜规则), *Studies in Law and Business*, No. 2, 2010.

[696] Pan, 'Conference Minutes', p. 14.

[697] Xia, 'Abolishment of Unwritten Rules', p. 101-102.

[698] McConville *et al.*, *Criminal Justice in China*, p 155-156.

[699] Article 150, Section 1, Chapter 2, Part 3, The Criminal Procedure Law of the PRC, amended on March 17th 1996.

[700] Article 172, Chapter 3, Part 2, The Criminal Procedure Law of the PRC, amended on March 14th 2012.

unwritten rules could also disable the parties for challenging them effectively. Unwritten rules therefore jeopardise the principle of open justice.

In criminal justice, the practice of unwritten rules does not only jeopardise the principle of open justice but also seriously infringes the defendant's rights and might lead to unfairness. For example, in criminal trials, due to occasional delays, when the defendant is held in custody for trial, he or she might have already been detained longer than the sentence he or she actually deserves according to law. However, the final sentence given by the judge generally is no shorter than the time spent in custody.[701] Gao Yifei explained that Chinese judges would try to avoid the trouble of the potential state compensation claim from the defendant and the pressure from the procurator and the police as they are concerned about the potential responsibility for over-legal-limit custody if a lawful decision is made.[702] If the defendant is likely to be found innocent, the judge would generally prefer to suggest the prosecution withdraw the accusation rather than give a verdict of innocence straightway, as both the court and the procuratorate would avoid "the responsibility of 'causing wrongful cases'", or out of the concern of "the working relationship between the court and the procuratorate".[703] If there are still doubts about the accusation, judges might still give a guilty verdict but with a more lenient sentence (especially in the cases where the death penalty is applicable), although "inadequate evidence" does not constitute mitigating circumstances according to the law and it will certainly not be given in the judgment as the reason for sentencing, it still becomes a widely followed "unwritten rules" in practice.[704] The reason for Chinese courts doing so is due to the pressure from the police or the local PLC whose head usually is also the head of local police, and this reason will certainly not be given in the final judgment; and also the criminal trial is criticised to be a formality of rubber stamping the conclusion achieved at crime interrogation in China.[705] Cases could also be decided by minutes of some meetings, e.g. a joint meeting of the local police, procuratorate, and court, or the

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[701] Gao Yifei, 'Justice behind Secrecy – Observation of the Alienation of the Administration of Justice under Unwritten Rules' (黑幕下的正义——审视潜规则下异化的司法) (*dffy.com*, March 14th 2005) <http://www.dffy.com/faxuejieti/ss/200503/20050314203726.htm> accessed October 22nd 2012.
[702] ibid.
[703] McConville *et al.*, *Criminal Justice in China*, p. 196-197.
[704] Chen Ruihua, 'The Verdicts which Leave Leeway——A Kind of Verdicts which Needs Review' (留有余地的判决——一种值得反思的司法裁判方式), *Legal Forum*, No. 4, 2010, p. 29.
[705] ibid, p. 29-31.

joint meeting called by the local PLC; however, the minutes of the meeting are not cited by the judgment or any other documents which are open to the public.[706]

Unwritten rules do not only exist in criminal justice but also civil justice e.g. a real estate trading contract dispute studied by Zhou Dengliang.[707] The fact of this case and relevant law is quite clear. However, in order to win, both parties seek the help and support from judges of higher rank or leaders of the court through their lawyers, friends and relatives. The trial judge tried to mediate but failed. Under the pressure of both parties, the judge presented the case to the adjudication committee to discuss, although in principle the adjudication committee should only discuss major and complicated cases. Finally, the judge gave a judgment according to the adjudication committee's decision. However, the discretion of the adjudication committee is regarded as a judicial secret and must not be cited in a judgment. The record of its discussion is categorized in the subsidiary files which are also confidential. Chinese judges are under an obligation to keep these judicial secrets, which will be critically analysed in the next section.

4.2.2.2 Mystery of the Subsidiary Files (*Fujuan*) and Judicial Secret: Institutional Defect

According to the Judges' Law of the PRC, Chinese judges have a duty to "keep state secrets and the secrets of the judicial work".[708] The SPC also enacted regulations on this issue, two of which are questionable regarding the principle of open justice. One is:

> The discretion of the collegiate panel and the adjudication committee of particular cases, all the different opinions between the superior and the subordinate court, and the opinion of the party committee and leaders of relevant work unit, must not be disclosed to irrelevant people or work unit, especially the parties of the vexatious suit.[709]

The other one is:

> The classification, binding and establishment of files of cases must keep inside information from outsiders, and establish the regular file and the subsidiary file separately according to the regulations. Requests for instructions and replies of cases, instructions from the leaders, opinions of the relevant work unit, the record of the discretion of the

[706] Pan, 'Conference Minutes', p. 12-13.
[707] Zhou, 'Unwritten Rules of Adjudication Committee'.
[708] Article 7, Chapter 3, Judges' Law of the PRC.
[709] SPC, *Regulations of Keeping the Secrets of Judicial Work by the SPC* (最高人民法院关于保守审判工作秘密的规定), September 5th 1990, Article 3.

> collegiate panel, the record of the discretion of the adjudication committee, case report and written materials of request to the relevant courts and work units for opinions on how to deal with a particular case and so forth, must be bound in the subsidiary files. Apart from being needed by work or authorized by the leader of the court, any individuals or work unit must not consult the subsidiary files.[710]

Judges who seriously default on this duty might be prosecuted.[711] The SPC requires that "judges should strictly follow the principle of public trials… but judges must not disclose judicial secrets".[712] Therefore, the degree of the openness is restricted by what judicial secrets are, which is subject to the court's discretion. Many local courts also enacted their own regulations that are more detailed regarding this issue according to the regulations enacted by the SPC.[713] Data concerning the death penalty, the discretion of the collegiate panel and the adjudication committee, and the requests for instructions and replies of the high profile cases are generally regarded as confidential.[714] The content of judicial secrets might be very extensive, e.g. the IPC of Hanjiang generally categorizes statistics of criminal justice as secret.[715] In order to maintain secrecy, Chinese courts are also vigilant towards their own staff, the media and lawyers, e.g. a primary court states that "as lawyers are vested with many rights by law and, therefore, know the details of a lot of cases, they are very likely to disclose judicial secret to their clients for the interest of their clients or their self-interest, which would disturb litigation activities".[716] These statements suggest that the Chinese judicial authority is reluctant to be fully committed to

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[710] ibid, Article 6.

[711] ibid; SPC, *The Notice of Issuing the Regulations of 'Five Strict Forbiddances" by the SPC' and 'Punishment of Violation of the "Five Strict Forbiddances" by the SPC* (最高人民法院印发《关于"五个严禁"的规定》和《关于违反"五个严禁"规定的处理办法》的通知), Document Number [2009] No. 2 (法发[2009]2 号), January 8th 2009.

[712] SPC and Ministry of Justice of the PRC, *Several Regulations of the Relationship between Judges and Lawyers in order to Protect Judicial Impartiality* (关于规范法官和律师相互关系维护司法公正的若干规定), Document Number (2004) No. 9 (法发（2004）9 号), Article 5, March 19th 2004.

[713] e.g. 'The Regulations of Keeping Secrets of Judicial Work by the IPC of Xuzhou City of Jiangsu Province' (江苏省徐州市中级人民法院关于保守审判工作秘密的规定) (*Xuzhou IPC*, July 11th 2006) <http://xzzy.chinacourt.org/public/detail.php?id=57> accessed October 24th 2012.

[714] e.g. 'Regulations of Keeping Judicial Secrets' (保守审判秘密细则) (*Jiyuan IPC*, September 12th 2003) <http://jyzy.hncourt.org/public/detail.php?id=107> accessed October 24th 2012.

[715] Article 1, 'Regulations of Keeping Secret of Judicial Work of the IPC of Hanjiang of Hubei Province' (湖北省汉江中级人民法院关于保守审判工作秘密的规定) (*Hanjiang IPC*, January 10th 2006) <http://hjzy.chinacourt.org/public/detail.php?id=65> accessed October 24th 2012.

[716] PPC of Gaoxin District of Chengdu, 'The Court of Gaoxin District Analysed the Work of Maintaining Secrecy and Gave Counter-measures under the Circumstances of Open Justice' (高新法院就公开审判情

open justice, out of practical concerns about their own interest. Therefore, secrecy becomes an obstinate barrier to actual open justice.

A question arises at this point: how could both of these two contradictory principles possibly be followed at the same time? The fact is: the secrecy principle prevails and the confidentiality of the subsidiary files is expected to be strictly followed in practice. The reason for doing so, according to staff at a local court, is that if the parties know the discretion of the judges who do not favour their claim they may be subject to hostility or even the risk of personal attack, or the parties might seek to petition.[717] This explanation puts all the blame on the parties and attempts to justify the secrecy by asserting the protection of judges. However, in fact, the subsidiary files could just be a veil over disgrace. For example, *The Beijing News* reported a case where the claimant, a frog farmer, lost due to the intervention of the local government.[718] After the claimant lost, his lawyer went to the court to consult the case files for appeal. Because of a mistake of the court staff, his lawyer also got the subsidiary file and found an official letter from the defendant – the administration committee of the industrial area which is a department of the local government. In this official letter, the defendant warned the court that

> the court should not believe the conclusion of the expert's evaluation and should give a judgment to reject the claims… if the court does not take our opinion, insist on deciding this case in its own way or to give a judgment according to the expert's evaluation or any other reason… it will cause vexatious suits or petitions from the claimant, and it will be detrimental for the court to deal with the lawsuits of the other three farmers. We suppose this is not what the trial court or the appellate court would desire.[719]

The above is an example of a civil case. Here is also an example from a criminal case where the adjudication committee was involved. [720] A person was prosecuted for

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势下审判保密工作进行分析并提出对策) (*Chengdu Courts*, July 17th 2006) <http://cdfy.chinacourt.org/article/detail/2006/07/id/555509.shtml> accessed October 24th 2012.

[717] Niu Guohua,, 'The Subsidiary Files of the People's Courts are Strictly Forbidden to be Borrowed and Consulted' (人民法院审判卷副卷严禁借阅), *Archives Management*, No. 4, 2003, p. 25.

[718] Yang Wanguo, 'Government Official Letters Warned the Court Do Not "Insist on Doing Things in Its Own Way" Construction in Li Du Industrial Area of Chong Qing Shocked Cultured Frogs to Death The Administration Committee Requires the Court to Reject the Farmer's Claim' (政府公函警告法院勿"一意孤行"重庆李渡工业园区施工震死养殖蛙 管委会要求法院驳回农民索赔请求), *The Beijing News*, June 28th 2010, p. A15.

[719] ibid.

[720] Chen Ruihua, 'The Mistaken Ideas of Justice – A Review of the Adjudication committee' (正义的误区——评法院审判委员会制度), *Peking University Law Review*, Vol. 1, No. 2, 1998, p. 402-403.

embezzlement but the collegiate panel intended to return a verdict of innocent. This case was presented to the adjudication committee who agreed that the defendant was not guilty. A judgment of innocence was subsequently made and sent to the defendant and the defendant was released. However, the head of the local procuratorate called the president of the court and required the court to change the decision. Subsequently the president of the court summoned a meeting of the adjudication committee to re-discuss this case and returned a guilty verdict. The adjudication committee is already criticised for its negative impact on judicial independence in the previous chapter. This example suggests that the secrecy can facilitate illegal or illegitimate influences. If a case is presented to the adjudication committee to discuss, the parties will not be informed of this matter, not even who sits on the committee and why they make a particular decision, which has seriously undermined the principle of open justice.

Although the SPC enacted a lot of documents regarding open justice and a lot of local courts also enacted similar documents to demonstrate their best endeavours to ensure open justice, the "secrecy of the judicial work" would still undermine the actual open justice, no matter how many trials are conducted in public or how much demonstration is given. Therefore, a crisis of public confidence is not merely a problem of image in China; rather, this system in itself has many interrelated problems and absurdities. The secrecy restricts public access to information and the truth, which would frustrate the public. The public does not merely keep the dissatisfaction to themselves, but there are attempt to challenge this situation, which will be developed by an example in the next section.

4.2.3 Public Opinion in Action: Challenging the Authority

With regard to what has been discussed above, even if public opinion appears to be partial, it could not attribute the entire fault to the public, because a lack of transparency within the Chinese justice system disables the public from discovering the truth and limited reliable information resources would certainly skew their opinion. The Chinese public are disappointed at restricted access to information, and they do not just passively accept whatever is disclosed to them. They would take action to discover more if they do not trust the information disclosed by the authority. However, their efforts might turn out to be a failure. A typical example for this is a case which is known as the "Hide and seek"

case where a number of internet users from the general public volunteered to directly take part into the investigation of a criminal case.

A sketch of this case is: a young man, Li Qiaoming, was under criminal detention for illegally felling trees; however, he was severely injured in detention and died in hospital. The local police announced that an accident happened when he was playing a "hide and seek" game with other detainees, and it caused fatal injury and death. The public were shocked by this novel but unbelievable explanation. A lot of people expressed their distrust of this conclusion by postings on the internet. Under great public pressure, the propaganda department of the CPC committee of Yunnan Province put a notice on the internet calling for volunteers from the general public and internet-users to participate in a special investigation committee with the opportunity of getting into the detention house and observing the place, "in order to satisfy the public's right to know".[721] This special investigation committee does not only consist of members of the general public, but also the staff from the local PLC, the local procuratorate, the local police and several media representatives.[722]

However, the investigation failed to discover the truth, as their request to watch the CCTV record and to meet the other suspects who were detained with Li Qiaoming in the same room were both refused by the police. According to the vice-president of this special committee, when they requested the record first time, the police stated that there was no CCTV record; however, when they requested again in the detention house, the police replied that there was a CCTV record of the bedroom but not the activity room, and the content of the record is confidential and the committee members were required not to disclose to anyone that there were CCTVs installed in the detention house.[723] This committee gave a report of the investigation, however, this report is mainly about the

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[721] Propaganda Department of the CPC Committee of Yunnan, 'The Announcement of Participation in the Investigation of the Truth of "Hide and Seek"' (关于参与调查 "躲猫猫"舆论事件真相的公告) (*Yunnan Net*, NA) <http://special.yunnan.cn/feature/node_8080.htm> accessed October 20th 2012.

[722] 'The Police Report the "Hide and Seek" Case to the Internet-users' Investigation Team' (警方向网友调查团通报"躲猫猫"事件) (*Southern Weekend*, February 20th 2009) <http://www.infzm.com/content/24156> accessed October 20th 2012.

[723] Bian Min, 'Investigation of Hide and Seek, Bian Min's Personal Voice (4)' (躲猫猫调查，边民个人声音（4）) (*Bian Min's Blog*, February 22nd 2009) <http://ynbianmin.blog.163.com/blog/static/1062349372009122111545536/> accessed October 20th 2012.

investigation process and no conclusion is reached. The report itself also states that this report cannot reveal the truth, while only the legal authority holding the resources can.[724]

As a result of this failure, some people started to suspect that this investigation was merely a show and that the members of the committee are stooges, and subsequently most of the representatives of the general public of this committee were found to be journalists or working for some official websites.[725] The president and vice-president of the investigation committee, who represents the general public, were not selected at random. The vice-director of the local propaganda department explained that he cares about their influence on the internet although he added that they are not their stooges.[726] Finally, the local police admitted that Li Qiaoming was assaulted by other detainees and the staff of the detention house failed to exercise their duty, and subsequently two responsible staff were prosecuted and convicted; however, this happened only after the Supreme People's Procuratorate (SPP) intervened.[727]

This example reveals a possible impact of the internet on public opinion and the justice system. No one has to convince an editor to publish their opinions on the internet and it seems to bring relatively more freedom compared with the paper media. The internet speeds up the transmission of information significantly. It can bring an issue to the public more extensively at a timely manner, and might develop public pressure on the authority. The internet might provide a new option of public scrutiny in China. However, this example suggests that the effect of a challenge from public opinion, even if facilitated by internet, remains uncertain within an authoritarian regime. The information on the internet is also subject to restrictions and censorship in China, which will be developed in the next chapter.

Based on what has been discussed in this section, the serious problems of China's justice system e.g. a lack of transparency have seriously undermined public confidence

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[724] Wang Peng and Shen Jiayin, 'The Report of "Hide and Seek" by Internet-users is Announced It Only Reports the Process without Giving a Conclusion The National News Office Declares that They Support Yun Nan's Way of Handling Public Opinion' ("躲猫猫"网民调查报告公布 只说过程不下结论 国新办曾表态支持云南做法), *Beijing Times*, February 22nd 2009, p. 06.

[725] Wang Peng, 'The Internet-users Investigation Team Took the Curtain-call but was Questioned' (网民调查团质疑声中谢幕), *Beijing Times*, February 22nd 2009, p. 07.

[726] ibid.

[727] 'The SPP Appointed Staff Intervene into the Investigation of the Hide and Seek Case' (最高人民检察院派员指导 介入躲猫猫调查) (*Xinhua*, February 26th 2009) <http://www.sd.xinhuanet.com/news/2009-02/26/content_15797838.htm> accessed October 27th 2012.

and trust. In order to improve public confidence, an apparent measure is to solve these problems. However, in this section it is established that the authority is not very sincere in doing so. Therefore, China is more likely to adopt another approach -- influencing or moulding public opinion and constructing image, which will be developed in the next section by discussion of show trials and in the next chapter by discussion of censorship of the media and the internet.

4.3 Show Trials, Public Sentencing Rallies, and Legal Propaganda in Mainland China: Could Public Confidence be Improved by Constructing Image and Influencing Public Opinion?

In the previous part, it is established that public opinion is skewed by limited transparency and information resources in China. In fact, public opinion might also be intentionally influenced or even controlled through selective information disclosure and image construction. The Chinese judicial authority is fully alert to public opinion and attempts to detect and control what the public thinks about ,e.g. an IPC appoints special staff to "collect, research, control and direct" public opinion.[728] The SPC also requires that "the main leaders of each court should have communication events with internet users at least once a year", and each court should "actively collect and learn about public opinion and publicize law; the SPC and each HPC must arrange meetings to discuss and analyse all kinds of public opinion at least twice a year".[729] The SPC also requires that the adoption of public opinion should be "an important assessment indicator of work".[730]

Adjudication is not regarded as purely a legal task in China. The SPC points out that courts are "special institutions for the party and the state to do mass work" and "criminal justice is both professional legal work and recurrent mass work"; therefore, courts must trust the masses and seek wisdom about dispute resolution from them, in order that their decision "is both in accordance with law and can reflect the wish and requirement of the

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[728] Liu, 'Sunshine Chongqing', p. 49.

[729] SPC, *Suggestions on Reinforcing the Work of Public Opinion Communication by the SPC* (最高人民法院关于进一步加强民意沟通工作的意见), Document Number [2009] No. 20 (法发〔2009〕20 号), April 13th 2009.

[730] ibid.

public" and "win approval from the public".[731] This double aim seems to be seriously proposed as the SPC asserts that it will establish a "performance assessing mechanism" to encourage judges to solve social conflicts and will strengthen training to improve judges' ability to recognize public opinion.[732] However, this is almost impossible. At least a decision cannot reflect the wishes of both parties as one must win and the other one must lose. The public is comprehensive and its members' opinions may vary. It is therefore very hard to reflect the "wishes and requirements of the public". If a court bows to a particular opinion simply to please some people, it might also disappoint some other people at the same time, and fundamental values of the rule of law are at stake. Moreover, as established in the previous section, the problems of the justice system diminish public trust in China. This is also expected to have an impact on people's trust on the decision in a particular case. Under these circumstances, an option to achieve the two contradictory aims and maintain public confidence probably is to influence public opinion or construct a positive image of the justice system. Three typical examples of such strategy are sentencing rallies, show trials, and legal propaganda. The first one and the second one will be discussed in this section, and the last one will also be discussed in this section when necessary but will be further developed with more details in the next chapter with the discussion of the Chinese media.

Show trials might remind readers of the trials in the former Soviet Union where a decision has been made before a trial, and therefore trials become a formality and its publicity becomes a way to legitimize its political nature. Show trials in China discussed in this section include but are not solely defined by this feature. Two essential elements which make a trial a show trial in China are: the manipulation of the trial process by the state actors e.g. judges, prosecution, the police, or the manipulator behind them e.g. the party; and the purpose of image construction. Manipulation of the trial process indicates that a decision has already been made before the trial, and there is no risk that an accused will go free after the trial. However, if a trial is only manipulated and conducted in an unfair or illegal manner, one might argue it might only be an unfair trial. Awol Allo argued that "a misapplication of a rule can be a mistrial or an unfair trial, but it is not a

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[731] SPC, *Several Suggestions on Bringing the Criminal Trial into Full Play and Impelling Resolution of Social Conflicts by the SPC* (最高人民法院关于充分发挥刑事审判职能作用，深入推进社会矛盾化解的若干意见), Document Number [2010] No. 63 (法发[2010]63 号), December 13th 2010, Suggestion 3.

show trial. A show trial always has a story to tell, a theatre to show, an image to create, and an agenda to perform with consequences that go far beyond the courtroom."[733] The appearance of show trials might vary, which depends on the purposes they serve and the target audience etc.

In the earliest times of the PRC, China's justice system has a strong populist feature. The CPC demonstrates that it is the representative of the people on which its legitimacy is based. Show trials were arranged and served as a strategy to persuade the public that justice would be brought by this new regime and therefore to establish the legitimacy of the new regime. Due to the political propaganda purposes they served, these trials are of excessive publicity and perhaps sensation.

An example is a rally of a murder trial in 1951, where a peasant's wife was poisoned to death by a landlord and his wife.[734] However, it was not dealt with as an ordinary murder case. Rather, it was made to symbolise the class struggle between the peasant class (whose interests the CPC represented) and the landlord class. Before the rally of the trial, the court had done a lot of propaganda work on this case by co-operating with other institutions, which e.g. publicised this case in newspapers, performed plays adapted from this case in the street, etc. The propaganda successfully stirred up people's emotions for the trial rally. During the rally, about 60,000 people attended, and the victim's husband and a few other peasants gave their accusations of the landlord class full of emotion. A local cadre also gave a speech during the trial rally and stressed the importance of class struggle. Subsequently, the feedback from the local peasants was "the current government is genuinely the people's government, and the court is genuinely the people's court, they always protect the people's interest", which suggests a success of this show.[735] As Li Site argues, the new government intended to direct people to a conclusion that their suffering is from the class oppression and the new government has saved them from this, and they

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[732] ibid, Suggestion 5.
[733] Awol K. Allo, 'The "Show" in the 'Show Trial': Contextualizing the Politicization of the Courtroom', *Barry Law Review*, Vol. 15, Fall 2010, p. 65.
[734] 'How the People's Tribunal of Nanzheng County of Shaanxi Province Quell Enemies and Educate the People through Trials' (陕西省南郑县人民法庭是怎样运用审判镇压敌人和教育群众的?) in The Judicial Reform Office of the Central Political and Legal Institutions (eds) *Reference Documents of Judicial Reform and Judicial Construction*, 1953, p. 98-101; cited by Li Site, 'Pedigree of Mass Line of the People's Adjudication' (人民司法群众路线的谱系), *Law and Social Sciences*, Vol. 1, 2006, p. 290-292.
[735] ibid.

expect the people to achieve this conclusion in their own discussion through their propaganda and the instructions of the judicial officials.[736]

Public trial rallies became radical in the Cultural Revolution, when the judicial system was largely destroyed by the mass campaign. Members of the public could replace professional judges to decide cases, as indicated by a popular Cultural Revolution slogan "smash up the public security organs, the prosecution organs and the courts". After the Cultural Revolution, this radical populist practice has been introspected and criticised. However, there is still some populist heritage in China's criminal procedure law. One of the fundamental principles provided by this law is: "when conducting criminal trial proceedings, the People's Courts, the People's Procuratorates and the public security organs must rely on the masses, take the facts as basis and take law as the criterion",[737] although it does not elaborate the meaning of "relying on the masses". This is a reflection of the political principle of mass line[738] in law. Hou Meng argues that the focus of mass line transferred to responding and meeting the people's demand as social stability might be affected.[739] This argument will be examined by examples of show trials driven by concerns of social instability later in this section.

Show trials of excessive publicity e.g. public trial rallies are different from public sentencing rallies. Sentencing rallies (*gongpan dahui*), refer to the public announcements of pre-decided sentencing out of courtrooms where a large audience is organized. There is no procedure of adjudication finding whether or not the defendant is guilty in sentencing rallies.[740] There are also similar rallies which are referred to as the combined rallies of public arrest and sentencing (*gongbu gongpan dahui*), where the suspects are actually arrested before the rally and a public announcement of arrest will be made at the rally, followed by an announcement of sentencing. In these public sentencing rallies, the accused is humiliated before a wide ranging audience, for deterrence or didactic purposes or responding to fear of crime.

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[736] Li, 'Pedigree of Mass Line', p. 291-292.
[737] Article 6, Chapter 1, Part 1, The Criminal Procedure Law of the PRC.
[738] Mass line refers to qunzhong luxin in Chinese. It is an important principle developed by the CPC,
[739] Hou Meng, 'Democratic Centralism under the Tradition of Politics and Law' (政法传统中的民主集中制), *Studies in Law and Business*, No. 1, 2011, p. 122.
[740] Susan Trevaskes, 'Public Sentencing Rallies: The Symbolizing of Punishment and Justice in a Socialist State', *Crime, Law and Social Change*, Vol. 39, Iss. 4, 2003, p. 360.

Show trials, sentencing rallies and the combined rallies of the public announcement of arrest and sentencing are often arranged in "strike-hard" (*yanda*) campaigns especially in the early campaigns. It is often referred to as a nationwide anti-crime campaign featured by harsh punishment and swift procedure, mainly for the purpose of deterrence, led by the CPC with the participation of the police, the procuratorate, and the court. The first one started at 1983. "Strike-hard" might also refer to other smaller scaled local anti-crime campaigns. "Strike-hard" also remains a penal policy for over twenty years in China. For example, the annual report of the SPC 1997, announced during a "strike-hard" period, pointed out that "cracking down on drugs crime harshly" was "a predominant task" for courts, and on the International Day Against Drug Abuse and Illicit Trafficking, courts in 27 provinces organized trials and sentenced 1,725 drug criminals, which "had educated and inspired the people and has deterred the criminals".[741] The general procedure of public sentencing rallies is, as Trevaskes described, that

> offenders are brought out on a platform or stage, handcuffed and under the guard of a line of court police. They sometimes wear placards around their necks and tied to their backs that detail their names, the nature of the offenses, and the sentences. Following a number of speeches by party, government, or criminal-justice functionaries, a senior judge or court president declares sentence. Offenders are then placed in court vehicles, sometimes in open trucks, and led either to their deaths at the local execution grounds, or to prison.[742]

An annual report of SPC also suggested that courts should publicize the decisions of major cases through "the propaganda and publicity tools", and many courts even had broadcasted trials through TV to "carry out the legal propaganda education work and increase the social effect of trials".[743] At the national conference of the public security work in 2001, it is indicated that "public security is not only a major social problem but also a major political problem… to start a nationwide strike-hard campaign… and to make a difference of public security as soon as possible is a strong desire of the people".[744] In this conference, the former president Jiang Zemin stressed public security is important for

[741] Ren Jianxin, 'The Annual Report of the SPC' (*China-judge*, March 11th 1997) <http://www.china-judge.com/fybg/gzbg06.htm> accessed May 12th 2014.
[742] Susan Trevaskes, 'Courts on the Campaign Path in China: Criminal Court Work in the "Yanda 2001" Anti-Crime Campaign', *Asian Survey*, Vol. 42, No. 5, 2002, p. 679.
[743] Ren, 'Annual Report of the SPC 1997'.

the CPC to "keep and strengthen" its power.[745] About two weeks after this conference, the Ministry of Justice and the National Legal Publicity Office of PRC (NLPO) published an announcement regarding "strike-hard". It also clearly re-indicates that public security is also an important political issue as "it concerns the ruling status of the CPC", and "only through this (strike-hard) the firm determination of the CPC and the government to deal with public security can be demonstrated to the people… and the stability can be maintained effectively and socialistic market economy's healthy development can be protected".[746] About how to carry out the propaganda, this announcement requires that

> propaganda should be carried out according to what is needed by the situation of the 'strike-hard' campaign in order to create an atmosphere of public opinion's attack (on crime). The principle of positive propaganda should be upheld, through struggles on special issues, sentencing rallies and the propaganda of cases, the determination and confidence of the CPC and the government to punish crime severely and rid the people of evil should be publicized.[747]

The achievement of "strike-hard" is required to be publicized through "all kinds of effective methods".[748] It suggests that the "strike-hard" campaigns are of a strong political nature. When deciding to start the first "strike-hard" campaign, the previous CPC leader Deng Xiaoping stated "serious criminals should be treated as the contradictions between enemies and us".[749] The background of the first "strike-hard" campaign was the soaring crime rate after the economics reform and China re-opening to the world. Public sentencing rallies could create an image that the state is standing on the side of the people fighting the same enemy – crime, which might suggest an attempt to distract the public's attention from the problems of legitimacy of the party and the justice system. Various studies criticise that "strike-hard" has failed to reduce crime and the rate of some targeted

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[744] 'The National Conference on Public Security Work is Held in Beijing, Jiang Zeming and Zhu Rongji have Given Important Speeches' (全国社会治安工作会议在京举行 江泽民朱镕基发表重要讲话), *People's Daily*, April 4th 2001, p. 1.
[745] ibid.
[746] Ministry of Justice and National Legal Publicity Office of the PRC, 'The Announcement of Reinforcing Legal Propaganda and Education during "Strike-Hard" and Regulating the Market Economy Order by The Ministry of Justice and the National Legal Publicity Office' (司法部、全国普法办公室关于在"严打"斗争和整顿市场经济秩序中加强法制宣传教育工作的通知), Document Number Ministry of Justice [2001] No. 047 (司发通［2001］047 号), April 16th 2001.
[747] ibid.
[748] ibid.

crime even rises.[750] However, there might be a gap between the effect and the perceived effect. Strategies of legal propaganda could be employed, as cited above, associated with public sentencing rallies, to construct a desired image -- an image of the CPC's effort and effectiveness to crack down on crime and protect the people, in order to improve public confidence. Therefore, how successful the Chinese criminal justice is might not depend on how well it can actually reduce crime but how successfully it can build up an image of the legitimacy of the CPC and the justice system, even at the price of the rule of law; given the fact that the principle of positive propaganda is required and information transmission and media is under control, which will be developed later in this section and further in next chapter.

Nowadays, public sentencing rallies still take place but much less often. Some clips of videos and photos of these rallies are available in the media or on the internet. Noticeably, there is a shift of public attitude towards these rallies. For example, in Loudi, a city in Hubei Province, the local authority is keen on arranging and publicizing the combined rallies for the announcement of arrests and sentencing (one of them is held in a football stadium with an audience of about 6,000), by asserting that it helps to reduce the crime rate substantially, and the provincial authority is also satisfied and the local court never objects; however, many people voice criticisms as it "damages the rule of law and infringes human rights" after they saw several photos of rallies published on the internet.[751] Courts in some developed areas are also getting more sophisticated and have stopped arranging sentencing rallies, e.g. at the end of "strike-hard" in 2003, and none of the courts in Beijing has arranged any sentencing rallies.[752] However, some other courts and official propaganda departments hold the opposite opinion and have arranged public sentencing rallies even in recent years. For example, in the official propaganda of a rally of public trial and sentencing where thousands were in the audience, the Justice Bureau of

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[749] Liu Fuzhi, ' "Strike-Hard" is Just Dictatorship – The Strategic Decision on "Strike-Hard" of Deng Xiaoping' ("严打"就是专政——记小平同志对"严打"的战略决策), *Chinese Criminal Science*, No. 1, 1992, p. 4.

[750] Peter D. Nestor, 'When the Price is Too High: Rethinking China's Deterrence Strategy for Robbery', *Pacific Rim Law & Policy Journal*, Vol. 16, No. 2, 2007, p. 527-534.

[751] Huang Xiuli, Kou Aizhe and Liu Jingjing, 'Customary Parading of the Criminals' (习惯性游街) (*Southern Weekend*, July 22nd 2010) <http://www.infzm.com/content/47996> accessed July 16th 2012.

[752] Li Gang, ' Beijing Closed the Curtain of "Strike-Hard" in a Civilized Manner, Death Penalty of 35 Cases was Revised to Death Penalty with Probation in Two Years' (北京"严打"文明谢幕 两年 35 例死刑改判

Longquanyi District of Chengdu collected and summarized the audience's compliment and gave their conclusion that it helped to improve the public's legal knowledge and the image of the judicial staff (the staff carrying responsibility for investigation, prosecution, adjudication or supervision).[753]

This raises an issue of the educative or didactic function of trials, which is generally expected within public trials and might also be an expected function of show trials. The Law of the *Structure and Framework of the People's Courts of the PRC* provides that "the people's courts, through all of their activities, should educate citizens to be loyal to their socialistic motherland and obey the constitution and law voluntarily".[754] It suggests that the expected educative effect is to promote Chinese citizens' awareness of their duties to the state more than to publicize legal knowledge, e.g. required by the SPC, when dealing with cases courts should "educate the people to pay tax according to law… and obey the correct and legal administration of the administrative organizations".[755] It even requires courts to provide the parties with "socialistic ethics and morality education" besides the legal education, and "urge the parties establish the correct marriage, family and moral values" during family law and marriage law trials.[756] Therefore, the expected educational effect of trials by the state is not merely to improve the public knowledge of law and the justice system, but also to sell the state ideology of law and morality to the ordinary people and to facilitate social control, although it is more palpable in high profile cases rather than most routine cases.

The educative function is also a part of public legal education, which is a government-dominated policy in contemporary China. Literally, public legal education refers to the activities arranged to improve the public's knowledge and awareness of law and the justice system. It is targeted at the general public, which is different from the professional education targeted at law school students seeking degree, lawyers or judges etc. It could reach the people at a most extensive scale, regardless of the cost. Events of

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死缓) (*Xinhua*, August 9th 2003) <http://news.xinhuanet.com/newscenter/2003-08/09/content_1017936.htm> accessed October 6th 2012.

[753] Justice Bureau of Longquanyi District of Chengdu, 'Tong'an Hold a Rally of Trial and Sentencing and has Improved the People's Legal Consciousness' (同安举行公审公判大会提高人民群众法律意识) (*Judicial Administration of Longquanyi*, NA) <http://www.lqysfj.cn/news/html/?634.html> accessed July 15th 2012.

[754] Article 3, The Law of the Structure and Framework of the People's Courts of the PRC.

[755] Ren, 'Annual Report of the SPC 1997'.

[756] ibid.

public popularization and education of law are organized from time to time. As explained by Lening Zhang *et al.* that "in contrast with the western belief in 'original sin' the Chinese have traditionally believed in the virtually unlimited power of education in shaping and influencing people's thoughts and behaviour".[757] This heritage is reflected by the target of the public legal education i.e. "all the citizens that have the ability to accept education".[758] Public legal education could have an impact on the perceived legitimacy of sentencing. An empirical study on a city in China finds out that "an offender from a neighbourhood with greater legal education activities is more likely to feel that his or her punishment is deserved than an offender from communities with less legal education activities".[759] Also, there are also attempts to prevent crime through public legal education, although the effect is uncertain. For example, the youth-targeted public legal education, carried out by different courts, justice bureau etc. across China, is focused on "increasing the legal knowledge of the youth and preventing youth crime", rather than informing them how the law can protect them from potential abuse etc.[760] This might be driven by the perceived seriousness of youth crime, e.g. according to the SPC's statistics, 88,891[761] out of 768,130[762] criminal cases heard in 2008 are committed by people from fourteen to eighteen. This figure might not provide a full picture as youth below fourteen do not take responsibility for a crime according to Chinese criminal law, and this figure excludes the crimes committed by persons aged between eighteen and twenty-five, which might be categorized as youth crime in some of China's statistics on youth crime. Trials of

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757 Lening Zhang, Steven F. Messner and Zhou Lu, 'Public Legal Education and Inmates' Perceptions of the Legitimacy of Official Punishment in China', *British Journal of Criminology*, Vol. 39, No. 3, 1999, p. 435.

758 E.g. 'The Fifth Five-year Program of Organizing Popularization and Education of Law among Citizens by Propaganda Department of the CPC Central Committee and Ministry of Justice' (中央宣传部、司法部关于在公民中开展法制宣传教育的第五个五年规划), Document Number Central [2006] No. 7 (中发〔2006〕7 号), March 17th 2006.

759 Zhang, Messner and Lu, 'Inmates' Perceptions', p.446.

760 'Haidian District has Innovated Propaganda in order to Build "Protection-Wall" between the Youth and Crime' (海淀区创新宣传形式 为青少年远离犯罪筑起"防护墙") (*The Justice Bureau of Beijing*, September 5th 2012) <http://www.bjsf.gov.cn/publish/portal0/tab38/info9080.htm> accessed October 1st 2012; Long Yunfeng and An Suping, 'The Court of Jiangyong: Prevent Youth Crime, Legal Propaganda Comes into the Campus' (江永法院：预防青少年犯罪 法制宣传进校园) (*Jiangyong Court*, October 10th 2012) <http://jyxfy.chinacourt.org/public/detail.php?id=1247> accessed December 1st 2012.

761 SPC, 'The Statistics of the Youth Crime Cases Tried by All of the Courts in China in 2008' (2008 年全国法院审理青少年犯罪情况统计表) (*SPC*, February 21st 2010) <http://www.court.gov.cn/qwfb/sfsj/201002/t20100221_1408.htm> accessed December 12th 2012.

762 SPC, 'The Statistics of the Criminal Cases of the First Instance of All the Courts in China in 2008' (2008 年全国法院审理刑事一审案件情况统计表) (*SPC*, February 21st 2010) <http://www.court.gov.cn/qwfb/sfsj/201002/t20100221_1410.htm> accessed December 12th 2012.

civil cases might also be used for the purpose of public legal education. For example, if a civil case has received great public attention and has propaganda and didactic benefits, even if the parties apply to try in private, the court will not support so as it perceives the public interest prevails.[763]

At this point, this thesis argues that these show trials are arranged for propaganda purposes. Chinese courts sometimes invite or arrange for a large audience e.g. deputies to the local People's Congress, members of the CPPCC, local government cadres, and local residents etc. to watch the trial, especially at some campaigns or during the projects of courts claiming to improve openness, e.g. the courts in Yunnan Province.[764] Chinese judges also have left their courtrooms and have arranged these kinds of trials in the community, e.g. the Primary People's Court (PPC) of Tongzhou District of Beijing has arranged three criminal trials in the local community where thousands attended each one in 2011.[765] These kinds of show trials are arranged to improve the image of openness of the justice system, although the effect is uncertain. Similarly, show trials might also be arranged to practice the policy of public legal education.

To clarify the potential confusion, this thesis argues that the actual meaning of public legal education varies in different countries, e.g. China and UK. In the UK, public legal education (PLE) is defined as:

> PLE provides people with awareness, knowledge and understanding of rights and legal issues, together with the confidence and skills they need to deal with disputes and gain access to justice. Equally important, it helps people recognise when they may need support, what sort of advice is available, and how to go about getting it. PLE has a further key role in helping citizens to better understand everyday life issues, making better decisions and anticipating and avoiding problems.[766]

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[763] PPC of Haicang District of Xiamen, 'Innovation'.

[764] 'Put Adjudication under the Sunlight – Documentary Reporting of the "Sunlight Adjudication Project" of the Courts in Yunnan' (让司法在"阳光"下进行——云南法院"阳光司法工程"纪实) (*SPC*, November 1st 2012) <http://www.court.gov.cn/xwzx/fyxw/dffyxw_1/gdfyxw/yunnan/201211/t20121101_179517.htm> accessed January 31st 2013; Tian Wenzhong, 'Sunlight Adjudication is Getting close to the Ordinary People Dangerous Driving Get Punished' (阳光司法近百姓 危险驾驶获刑罚) (*Yunnan Courts*, October 23rd 2012) <http://www.gy.yn.gov.cn/Article/ztbd/sfgk/201210/30134.html> accessed January 31st 2013.

[765] 'Tongzhou Court Has launched Travelling Criminal Trials and Achieved New Effects' (通州法院扎实推进刑事巡回审判取得新成效) (*Tongzhou Court*, February 9th 2012) <http://fy.tongzhou.gov.cn/fy/infodetail/?infoid=898bf355-dab2-4813-9e98-872515aa8ae2&categoryNum=005> accessed January 31st 2013.

[766] PLEAS Task Force, *Developing Capable Citizens: The Role of Public legal Education The Report of the PLEAS Task Force* (Russell 2007), p. 9.

Against of a background of the PLE project that "8% of law-related problems result in violence or damage to property" in the UK, [767] what is given above suggests that PLE is more focused on providing information to help people so that they would be "capable of using the law and the legal system wisely and efficiently",[768] in contrast with China's propaganda and social control purposes. According to *the Report of the PLEAS Task Force*, the delivery methods of PLE do not include arranging audiences to watch public trials in the UK.[769] An explanation of this difference might be a different perception of the possible effect that PLE could have in the UK. Provision of information might find it is hard to change strong beliefs of members of the public, although it could raise awareness of the complexities of issues e.g. sentencing and the flaws of their comprehension.[770]

A formalized public trial conducted in a courtroom might be or perceived to be a show trial. In China, trials are generally short due to the pre-trial preparation where judges usually familiarize themselves with case files and the inquisitorial mode is adopted. In criminal justice, generally the major evidence presented at trial is by the prosecution which is rarely challenged or questioned by the defence, and a guilty verdict is very likely to be returned.[771] Under such circumstances, trials are likely to become a formality. As McConville *et al.* concludes that "Courts operates on a presupposition of guilt based upon the prosecution file. What happens in the court hearing is largely incidental to verdict and the 'trial' is a trial in form only or, occasionally, functions to serve a wider social or political purpose."[772] However, they are not necessarily show trials if there is no image construction. Image construction does not solely refer to publicity. For example, attending and reporting on sensitive cases is often restricted, but trials of sensitive cases might appear conducted in a legal way e.g. the defendant has a lawyer to represent him etc., in order to construct an image that the trials are legitimate. However, they are still show trials in nature and the trial process is subject to manipulation. Generally, lawyers are required to report to the local Justice Bureau in time after they take sensitive cases and there are restrictions for them to publish articles or accept interviews when representing sensitive

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[767] ibid, p. 8.
[768] ibid, p. 7.
[769] ibid, p. 15.
[770] Rob Allen, *Rethinking Crime and Punishment: The Report* (Esmée Fairbairn Foundation 2004), p. 28.
[771] McConville *et al.*, *Criminal Justice in China*, p. 259-260.
[772] ibid, p. 376.

cases.[773] Many local Justice Bureaux and the national Lawyers Association have made guidelines for lawyers regarding their work in sensitive cases, details vary but their aim is to restrict lawyers' activities. There are even restrictions on lawyer's arguments in court, e.g. the Justice Bureau of Puling District of Chongqing City requires: when representing parties in sensitive cases, lawyers' law firm must arrange a discussion for this lawyer with experienced lawyers, and the meeting must be supervised by the local Justice Bureau; the lawyer must not disobey the suggestions from the local Justice Bureau; the local Justice Bureau will ensure the lawyer adhere to "political and propaganda disciplines".[774] Chinese lawyers have to follow these guidelines, as they have to register at the Justice Bureau each year to maintain their qualification, and the Justice Bureau has power to deregister or cancel a lawyer's qualification. Some regulations clearly warn lawyers by providing the potential punishment, e.g. cancelation of their qualification.[775] This is not the worst situation which might happen to non-cooperative lawyers, as some lawyers have even suffered persecution.[776] Under these circumstances, it is difficult to expect a fair trial even if the parties are represented by lawyers (although there are a few well-known outspoken lawyers even in sensitive cases e.g. Zhang Sizhi who has never won any case in the previous 30 years)[777], and therefore the trial could become a show trial. An example of this kind of show trial is Yang Jia's murder trial. The basic scenario is that a young man, Yang Jia, assaulted and murdered several policemen in a police office building in Shanghai, which has been discussed in Chapter 1.

Before the trial, Yang Jia's father hired two lawyers from Beijing (Yang Jia and his family were from Beijing) for Yang Jia. They went to where Yang Jia was detained and tried to meet him, but were refused because their request needed the approval of the procuratorate – who was in charge of the prosecution. These two lawyers' request was subsequently refused by the procuratorate, who asserted that Yang Jia would not accept

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[773] E.g. Justice Bureau of Xinjiang Uygur Antonymous Region, 'The Coordinative Guidelines of Lawyers' Work when Representing Sensitive and Collective Cases at the Antonymous Region (Pilot Version)' (《自治区司法厅关于律师代理敏感性及群体性案件协调指导工作预案（试行）》), Document Number Xinjiang Justice Bureau [2009] No. 9 (新司通〔2009〕9 号), February 25th 2009.

[774] Justice Bureau of Puling District of Chongqing City, 'Regulations of Lawyers' Work when Representing Collective Cases (cases where a large number of people involved) and Sensitive Cases of Puling District' (涪陵区规范律师代理群体性、敏感性案件工作) (*Judicial Administration of Chongqing*, March 28th 2011) <http://www.cqsfj.gov.cn/News/File/show.asp?News_Id=39922> accessed December 6th 2012.

[775] Justice Bureau of Xinjiang Uygur Antonymous Region, 'Representing Sensitive'.

[776] McConville *et al.*, *Criminal Justice in China*, p. 317-318.

the lawyers hired by his father and he would only accept lawyers hired by his mother. These two lawyers requested to meet Yang Jia to make sure this was genuinely his decision but still were refused.[778] This is not very unusual. The police, the public security bureau in mainland China, are in charge of the detention houses for suspects. They "routinely deny or delay access to clients, harass and threaten lawyers or, at its lowest, treat them with disrespect".[779]

Subsequently, Yang Jia's mother "hired" a lawyer from Shanghai, Xie Youming, who was selected by the prosecution and the police. However, this lawyer was also the legal advisor of Shanghai's government, and he was "hired" by Yang Jia's mother during her disappearance at the investigation and trial process while none of her family members knew where she was. In an interview after Xie met Yang Jia, he told a journalist that Yang Jia was "quite calm" and "has relatively high legal consciousness", and gave his expectation to sentencing: "for circumstances of crime as serious as Yang Jia's, generally speaking, there is no doubt about sentencing, unless something unexpected happen, the death penalty will be applied".[780] This has caused a lot of criticism from many Chinese lawyers and scholars, as Xie ignored the conflict of interests and this kind of comment by a defence lawyer about his client was inappropriate and disadvantageous to the client.[781] Yang Jia was sentenced to death at the first trial and the decision was approved at appeal.

After Yang Jia's execution, Yang Jia's mother was found at the Ankang Hospital -- a subordinate mental hospital of the Beijing's police -- for a mandatory mental treatment, and she was sent there by the local police, according to a doctor.[782] However, when her family members reported to the Beijing's police that Yang Jia's mother had disappeared, the police refused to file the case; and when they tried to sue the police for nonfeasance the

[777] McConville *et al.*, *Criminal Justice in China*, p. 336.

[778] Tian Beibei, 'The Lawyers Hired by Yang Jia's Father were Refused to Meet Yang Jia' (父亲所聘律师会见杨佳受阻), *The Beijing News*, July 17th 2008, p. A27.

[779] McConville *et al.*, *Criminal Justice in China*, p. 380.

[780] 'A Journalist Investigate the Hearsay of Assaulting Police Lawyer Stated that Yang Jia Cannot Escape Death Penalty' (记者调查核实袭警案传闻 律师称杨佳难逃死刑) (*Xinhua*, July 8th 2012) <http://news.xinhuanet.com/local/2008-07/08/content_8507329.htm> accessed December 7th 2012.

[781] Zhang Liming, 'Problems of the Procedure Fairness of the "Yang Jia Assaulting Police Case"' ("杨佳袭警案"的程序公正问题透视), *Legal Science Monthly*, No. 1, 2009, p. 20.

[782] 'It is the Police who Sent Yang Jia's Mother to Mental Hospital' (杨佳母亲进精神病院系警方所送), *Southern Metropolis Daily*, November 12th 2008, p. AA32.

court refused to file the case.[783] Yang Jia's mother explained to a journalist that she lost contact with the outside world and Xie was free of charge, and therefore she signed the contract for his representation.[784] However, if she was really affected by mental problems, it is doubtful whether the contract she signed to hire the lawyer is legally binding. If she does not have mental problems, why she was forced to accept treatment by the police at such a particular time when her son could not hire a lawyer by himself and would only accept, according to the procuratorate, lawyers she hired?

Mandatory mental treatment is sometimes abused in China, as there is research e.g. by Robin Munro[785] that examines its abuse especially for political purposes and studies Ankang hospital as an example. This suggests that Yang Jia's mother might also be a victim of such abuse. It therefore raises doubts that whether the police and the prosecution selected a lawyer who would be advantageous to them on purpose. On appeal, Yang Jia was represented by a different lawyer, Zhai Jian, who was appointed by the court. However, Yang Jia's father told a journalist that he would sue this lawyer for omitting some of his instructions, e.g. calling for several witnesses and telling the court that they did not want Zhai to represent Yang Jia; finally this lawsuit was not taken by the court for "deficit of evidence".[786] Based on what has been discussed above, it is hard to conclude that Yang Jia has received a fair trial.

Apart from the problems of the defence lawyer, there are still other procedural problems that might lead to criticisms of Yang's trial as being a show trial, e.g. openness of the trial and the problematic forensic evidence of Yang Jia's mental state. In the judgment of the first instance, it states that it was a public trial according to law.[787] However, this is far from the fact. A lawyer noticed that this court usually put announcements of the date and venue of trials on its website; however, no information about the date and venue of Yang Jia's trial could be found on the website before the

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[783] 'The Full Record of the Disappearance of Yang's Mother' (杨母"失踪"全记录), *Southern Metropolis Daily*, November 11th 2008, p. AA31.
[784] 'Wang Jingmei: The Lawyer Came on His Own Initiative and It is Free' (王静梅:律师主动找来,而且免费), *Southern Metropolis Daily*, November 11th 2008, p. AA31.
[785] Robin Munro, 'Judicial Psychiatry in China and Its Political Abuses', *Columbia Journal of Asian Law*, Vol. 14, No. 1, 2000.
[786] Zhu Yan, 'Yang Jia's Father Sued the Defence Lawyer' (杨佳父起诉辩护律师), *The Beijing News*, October 26th 2008, p. A07.
[787] (2008) Shanghai Second IPC Criminal First Instance No. 99 (（2008）沪二中刑初字第 99 号).

trial.[788] On the day of trial, relevant information appeared on the website and the electronic screen outside the court. However, the journalists or ordinary people outside the court were refused entry to watch the trial. A journalist noticed that about six hours later several police vehicles ran out of the side entrance of the next-door procuratorate from the court, which steered clear of most journalists at the main entrance of the court where several plainclothes policemen were on guard. This journalist was told by the security staff of the court that the persons in those vehicles were "important cadres" who came to watch the trial.[789] The next day, a staff member of the court explained to journalists that the entrance for the audience of the case changed temporarily that day without timely notice, and the public gallery was full immediately because the police had reserved all the seats in advance.[790] Although there is no further evidence to prove the journalists' words, it could lead to public outrage at perceived unfair procedure. It is difficult to conclude that this trial is an example of open justice, as these particularly arranged audiences have blocked the trial from scrutiny of the public and media which is an indispensible part of open justice. This intermediate court locates in Shanghai, a very developed city in China. It has better facilities than many local courts in those under-developed areas discussed in the second part of this chapter. This case provides further evidence that mere improvement of facilities, e.g. setting up website and electronic screens, does not necessarily indicate improvement of openness of the justice system; and publicity does not always indicate open justice, which has been established in the first part of this chapter.

The investigation was done by the policemen at the same police office which Yang Jia attacked. The evidence of Yang Jia's mental state is provided by the Research Centre of Institute of Forensic Science, a subordinate organization of the Ministry of Justice. The court held the organization which provided the evidence has legal qualification and accepted the evidence.[791] However, this organization is not legally eligible to provide forensic evidence according to Chinese law. The criminal procedural law at that time

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[788] Zhang, 'Procedure Fairness Yang Jia', p. 25.
[789] Lv Zongshu *et al.*, "The Trial Lasts for about Six Hours No Media Managed to Enter into the Court to Watch the trial" (庭审进行约六个小时 无媒体进入法院现场旁听), *The Beijing News*, August 27th 2008, p. A23.
[790] Lv Zongshu *et al.*, 'The Court: The Entrance for Audience Changed Temporally' (法院：旁听入口临时变更), *The Beijing News*, August 27th 2008, p. A23.
[791] (2008) Shanghai Second IPC Criminal First Instance No. 99.

clearly provides that "…medical verification of mental illness must be conducted by a hospital designated by a people's government at the provincial level",[792] although it was amended in 2012. Also, the Standing Committee of the NPC has enacted a regulation which prohibits any court or judicial administrative organization to establish judicial expertise organization.[793] The organization is not a hospital, and it is subordinate to a judicial administrative organization, and therefore it was not legally eligible to provide forensic evidence of Yang Jia's mental state. However, this evidence was also accepted by the appellant court to affirm the decision of the first instance.[794]

What happened in Yang Jia's trial suggests that this trial is very likely to be a show trial in nature. It is hard to conclude that this trial has improved public confidence. This case provides further evidence that the procedure fairness and how courts treat public members affects public confidence to courts more than outcome of cases, which has been established in the first part of this chapter. The problems of procedural fairness exposed by this case and the practice of show trials are not unusual within China's criminal justice. Lan Rongjie argues that in sensitive cases, the procuratorate – the prosecution can coach defence lawyers to act in a particular way in advance, in order to convict the accused in a trouble-free manner; and even in non-sensitive cases, when the court has to appoint lawyers for the defendant according to law, they would also prefer to appoint co-operative lawyers to "finish their cases efficiently, conveniently and lawfully".[795] This is possible as lawyers are not independent in China, and if they do not co-operate they might lose their qualification to practice, as discussed earlier.

Although Yang Jia's trial appears to be different from the rallies, they both suggest manipulation of the trial procedure. It therefore constitutes a key feature of show trials more than the number of the audience and the degree of publicity, especially in the context that neither the judiciary nor lawyers are independent in China. The formality of a show trial depends on the concrete circumstances and concern of the manipulator, which might

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[792] Article 120, Section 7, Chapter 2, Part 2, The Criminal Procedure Law of the PRC, amended in 2012 and came into effect in 2013.
[793] Standing Committee of the NPC, The Decision of Standing Committee of the NPC about Regulating Issues of Judicial Expertise (全国人大常委会关于司法鉴定管理问题的决定), effective on October 1st 2005, Article 7.
[794] (2008) Shanghai HPC Criminal Final No. 131 ((2008)沪高刑终字第 131 号刑事裁定书).
[795] Lan Rongjie, 'A False Promise of Fair Trials: A Case Study of China's Malleable Criminal Procedure Law', *UCLA Pacific Basin Law Journal*, Vol. 27, Iss. 2, 2010, p. 178-179.

be the court, the CPC or the government. Although McConville *et al.* argues that cases in England could also be constructed, he also noted that "in China cases are almost exclusively constructed by state actors".[796] Show trials might have some of the formality of a fair trial, e.g. representation of lawyers, "public trial"-- audience in the public gallery, evidence is disclosed before the defendant etc., which might be driven by an attempt to create a legitimate image to justify both the procedure and decision are lawful and fair. However, the image created by show trials might not be convincing to everyone, and therefore conducting show trials does not necessarily improve public confidence.

Yang Jia's case was heard in Shanghai and aroused widespread interest, but there was no public sentencing rally arranged to humiliate him publicly. Why not? The first explanation might be the public's sympathy for Yang Jia and the suspicion of police brutality and torture. As a result, it is difficult to create an image that the state is fighting crime to protect the public in this particular case. Rather, it might deliver an image that the state is protecting brutality against the people. The second explanation might be an uneven change of social culture and values in China, due to the uneven development in this massive country. Social and cultural changes might affect public confidence, as established in the first part. Usually, most of the audience at public sentencing rallies are the local residents. Nowadays, public sentencing rallies in news reports or propaganda are often held in towns or cities which are less developed than e.g. Beijing and Shanghai, as given earlier in this section. It assumes that the value of the rule of law is better received and human rights consciousness is better developed in developed cities, correlated with a better economical and educational development and more contact with the western world and the values widely recognized by the west. What looks legitimate varies from different audiences. To a group of human-rights conscious audience, those public sentencing rallies would create an image of illegitimacy and invite criticism rather than the opposite. Neither would a trial by puppet lawyers and judges deliver a legitimate image to rule-of-law approvers. Therefore, although Yang Jia is tried in a very civilized manner and not humiliated at a rally, image building is not the most successful in this case due to the perceived procedural problems.

There are two unconfirmed pieces of hearsay about Yang Jia's motivation. One is that Yang Jia's teeth were broken by several policemen in Shanxi, as Yang Jia's aunt and

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[796] McConville *et al.*, *Criminal Justice in China*, p 433.

several friends told a journalist.[797] The other one is that he was beaten by those policemen after he was suspected of stealing a bike. A man called Jia Xiaoyin put an article on the internet, titled "the inside story of the assaulting police case in Shanghai", which asserts that Yang Jia's generative organ was beaten by several policemen and he lost reproductive capacity, which became his motivation to revenge his disability upon the police. This article was widely transmitted on the internet. Subsequently, Jia was arrested on suspicion of slander, and the reason given by the procuratorate is that what Jia fabricated has seriously damaged the reputation of policemen and the image of the police.[798] It is unlawful, because according to Chinese criminal law only a person can be the victim of slander, an organization cannot constitute a legal victim of slander.[799] Although this is an official demonstration that what said by Jia is merely a rumour, there is no evidence shows that the public were convinced. It suggests that a problem behind this case is the disaffection of brutality and arbitrariness of the police in China. Therefore, even if the court had given a more lenient sentence to please the public, without disclosure of the truth, the real problem (which might be the brutality of the police) still remains, as well as the concern of procedural problems in criminal justice. Therefore, this case also provides support for this thesis's argument that simply bowing to public opinion does not necessarily improve public confidence in the justice system, as what the public desires might be more than a particular decision of a case.

Show trials might even lead to miscarriages of justice, which certainly will diminish public confidence. An example of a show trial which turns out to be a miscarriage of justice is She Xianglin's murder trial, who was convicted of murdering his wife but his wife came back to the village alive 11 years later. As discussed in Chapter 3, the local PLC intervened and instructed the prosecution and the court how to deal with this case. However, why did they decide to render a guilty verdict when there were defects in the evidence? Interestingly, it is driven by "public opinion". The family of She Xianglin's wife -- the "victim" kept on petitioning and collected about 220 local people's signature to

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[797] 'The Life-Path of the Young Police Assaulter Yang Jia' (袭警青年杨佳的人生轨迹), *Beijing Times*, July 12th 2008, p. 13.

[798] 'Jia Xiaoyin Created Rumour on Internet and was Arrested' (郑啸寅网上造谣被批捕), *Sichuan Legal Newspaper*, July 16th 2008, p. 01.

[799] Article 246, Chapter 4, Part 2, The Criminal Law of the PRC.

demonstrate a serious public outrage and to demand a guilty verdict.[800] Lan Rongjie argues that in this case if the local procuratorate refuses to prosecute or the local court refuses to render a guilty verdict, they might invite suspicion from the local people of taking bribery; and sometimes Chinese judges will convict an infamous defendant to avoid such suspicion given the fact that many judges are perceived to be corrupt.[801] Petitioning and gathering people's signatures also make it become a perceived risk of social stability and a political issue for the local PLC. As Lan Rongjie argues China has not established democracy and therefore the CPC needs public confidence to maintain its legitimacy and governance, and "in any case where judicial integrity conflicts with social stability, the former is usually compromised", indicated by a Chinese political slogan that "stability overrides everything else".[802] Therefore, when the authority refers to "public opinion" in the context that it bows to "public opinion", in fact it refers to its concern about the pressure from or outrage of some particular groups of people which might lead to social unrest and endanger social stability; and show trials sometimes become expedient to alleviate a potential social unrest.

There is often something hidden or attempted to be hidden behind a show trial. In order to keep it hidden, manipulation might outstretch beyond the trial process to maintain the success of a show trial. For example, in She Xianglin's case, She's mother and elder brother petitioned for him and got detained; a villager who gave testimony that he had seen She's wife also got detained.[803] In contrast with the petition of the family of She's wife, She's family did not stir up any public pressure. It is apparently easier for the local authority to deal with a few individuals of no influence than 220 determined people. Therefore, in the context of public opinion as public pressure or potential social unrest, this kind of strategy might drive some desperate or angry people to solve grievances through petitioning or creating social unrest, although the result is uncertain, e.g. the riots in Weng'an. In Weng'an, driven by suspicions of the police covering up the truth of a girl's death, rumours of the possible murders, and its brutality against the local people who demanded to know the truth, tens of thousands of local residents smashed and

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[800] Yu Yifu, 'An Auto-Critique of the Miscarriage of Justice of She Xianglin' (佘祥林冤案检讨) (*Southerncn.com*, April 14th 2005) <http://www.southcn.com/news/community/shzt/ssl/opinion/200504140773.htm> accessed May 12th 2014.
[801] Lan, 'Malleable Criminal Procedure Law', p. 197.
[802] ibid, p. 189.

attacked the government, local party, and the local police buildings and set fire on several police vehicles.[804] In fact, the budget on “maintaining stability” also raises a lot with the number of mass incidents and people get involved, e.g. in Guangzhou the expense on “maintaining stability” exceeds the social security fund.[805]

Public opinion or public pressure does not always succeed. In Yang Jia’s trial, the court did not bow to any sympathy from the public; while in She Xianglin’s murder trial, the court bowed to the 220 angry local public members under the instructions of the local PLC. Both of the accused are ordinary people of no significance, but why are the results so different? In Yang Jia’s trial, the victims are policemen and the investigation was done by the police where the victims were from. The police are able to manipulate the trial, as the court and procuratorate has to listen to the PLC, whose head could be the head of the police in practice as established in Chapter 3. However, in She Xianglin’s trial, the “victim” is an ordinary person as much as She Xianglin is. When public opinion stood on the side of the victim’s family, the scale of justice leaned toward their determination. Therefore, when Chinese scholarship focuses on criticizing public opinion compromising judicial independence and impartiality or leading to an unfair decision, they might ignore what public opinion actually is in a particular context and how different nuances affect this process. On the other hand, the similar misfortune of these two accused suggests how difficult it would be for the most disadvantaged persons to seek justice, who are not able to employ any influence, whether political influence or public pressure. It is difficult to expect any confidence by them in the justice system.

Concluding Remarks

Shen Deyong, the vice president of the SPC, expressed his concern about the crisis of public confidence, that “currently, distrust in the justice system of some people is

[803] Yu, ‘Auto-Critique She Xianglin’.
[804] ‘Weng’an Incident is a “Sample Incidence” of China’s Mass Incidents in Recent Years’ (瓮安事件是近年来我国群体性事件的“标本性事件”) (*Xinhua*, September 8th 2008) <http://news.xinhuanet.com/legal/2008-09/08/content_9847136.htm> accessed December 13th 2012.
[805] Research Team of Social Development of the Sociology Faculty of Tsinghua University, *Achieving Long-time Social Stability through Institutionalization of Interest Expression* (以利益表达制度化实现社会的长治久安) (The Forum of Social Development of Tsinghua University 2010), p. 2-3.

becoming a common social mindset, this is extremely grave".[806] There is more than one option to deal with this crisis, e.g. dealing with the problems of the justice system, or hiding the problems behind a constructed image and restricting information resources to public scrutiny etc. China has mainly adopted the approach of image constructing: constructing what the authority would like the public to see, e.g. through legal propaganda and show trials of excessive publicity, as established in the third part; and hiding what might disappoint the public e.g. through restriction of information sources, as established in the second part, and through manipulation of trials as established in third section; with attempts to influence public opinion. However, if the justice system remains far away from the rule of law with many serious problems of its performance, solely constructing images with attempts to influence public opinion will neither address the root cause nor improve public confidence.

The justice system should be open to public scrutiny, as the public has a right to know. The principle of open justice cannot be reversed for utilitarian reasons, e.g. the public is ill informed, too punitive, or public opinion might compromise judicial impartiality and independence etc., although they might be the facts, which is established in the first part. The arguments which attempt to challenge open justice by such reasons are also problematic, especially when isolated from the social and cultural context and various relevant details. This thesis does not suggest being blind to these problems if there are any. Measures to improve public knowledge and understanding of the law and justice system might be employed, if not skewed by propaganda purposes and the actual performance of the justice system would not significantly frustrate the public. Also, effective measures should be based on a comprehensive and detailed understanding of what public opinion is.

Public opinion is not merely a loose concept of what a massive diverse group of people think. Its meaning or substance varies in different contexts. In China, it might refer to public pressure of a potential risk of social unrest perceived by the authority, a concept moulded by elites with their interests, public confidence, or just what the authority interprets it to be as an authoritarian regime could manipulate the interpretation of public

[806] 'The Vice-president of the SPC: Distrust to the Justice System of Some People becomes a Common Social Mind' (最高法副院长：不信任司法渐成普遍社会心理), *Southern Metropolis Daily*, August 20th 2009, p. AA15.

opinion, as established in this chapter. It raises concerns that the most disadvantaged social groups, who are not able to create any kind of "public opinion", might not be able to redress their grievances and remain forgotten. The aim of improving public understanding and improving public confidence does not end at pragmatic improvement e.g. efficiency or better functioning of the system, but to deliver justice, where China's current approach can never arrive.

In order to provide further evidence to the central argument of this thesis, (i.e. it is misperceived that public opinion and public pressure is the major concern compromising judicial independence and impartiality in China; while the real problem, with regard to public opinion, is a crisis of public confidence caused by various problems of the justice system and an ignorance of such, which leads to a problematic image constructing approach) the next chapter will study the role of Chinese media and the internet on this issue, e.g. to what extent control remains over the Chinese media; how they could be employed for propaganda purposes or to influence public opinion; the "supervision by public opinion" function of the Chinese media; whether the dramatic development of the internet has brought more freedom of information and expression or triggered more control etc.

CHAPTER FIVE

MEDIA, THE INTERNET, AND PUBLIC OPINION: PUBLIC OPINION AND PUBLIC SCRUTINY AS IDEOLOGICAL RHETORIC

Introduction

The concern that public opinion might influence Chinese judges and compromise the fundamental values of the rule of law presumes that the Chinese public have: 1) information freedom and availability of reliable information resources; 2) freedom to speak out. This chapter will discuss how the Chinese media could influence public opinion and how freely they can speak out, which will provide evidence for whether or not there is a tension between public scrutiny and judicial independence in China, or the tension between freedom of speech and judicial independence/impartiality that is theorised by Chinese scholars as established in the Introduction of this thesis. The previous chapter has established that the CPC is aware of the crisis caused by a lack of public confidence in the justice system; therefore, they attempts to maintain the strong secrecy features in China's justice system. As a result, reliable information resources are very limited to the public, which could skew public opinion. Legal propaganda and show trials are also employed for the purpose of image construction to allay the crisis. Therefore, it becomes possible that the CPC might take advantage of their control over the media in an attempt to restrict public scrutiny and construct public opinion.

The media is an important information resource of the justice system and individual legal cases for the public. How free the media is has a significant impact on how much the public can know. At the beginning of the PRC, the media was established as the mouthpiece of the party and the government in China. The commercialization of the mass media has brought more freedom of reporting, however, this mouthpiece position might

have not been fundamentally changed. The state still maintains its control when necessary through various ways. The first section of this chapter will study: 1) the regulations or restrictions on the media's reporting of legal cases; 2) the media's propaganda function with regard to particular legal issues and cases e.g. corruption cases, where propaganda reporting will be distinguished from media scrutiny; 3) the public's reaction or attitude towards such propaganda, to provide evidence for its impact on public opinion.

In the Chinese state ideology, the media also has an important function – "supervision by public opinion" or what might be translated as "public opinion supervision", which literally means public scrutiny. It is frequently mentioned in discussions on the tension between public opinion and the judicial independence and impartiality in China. The second section will discuss whether this term is what it literally suggests or is dominantly an ideological rhetoric.

The widespread development and use of the internet in China has brought great changes of information flows and public communication compared with the traditional paper media. Members of the public can exchange information and opinions in a much timelier manner, and therefore might be able to construct a strong attitude towards a case and put pressure on judges or whoever has the last word about the case. Some Chinese judges and the CPC have also expressed their anxiety over the pressure brought by the internet, as established in the previous chapter. However, as suggested by a case study in the previous chapter, the internet might not necessarily establish or guarantee freedom of speech. The equality of access to the media and the internet and the variable ability to make voices heard via such channels could also have an impact on this issue. The third section will look for more evidence of restrictions on freedom of speech and the public's reaction to such restrictions in the context of the changes brought by the internet. It will also discuss whether any new strategy has been taken to influence or construct public opinion. By constructing public opinion, it refers to the efforts taken to keep the public silent on particular issues, filter critical speech, make up positive speech on purpose to dilute the critical speech, which mould the appearance of public opinion and provide "evidence" for the state to assert what public opinion is and demonstrate public support to legitimize the decision of a particular legal case, legal issue, or a policy. In this sense, the term "public opinion" becomes an ideological rhetoric rather than what the public really thinks about. This will provide a more in-depth understanding of public opinion in

China's context especially in the aspect of political ideology, and further findings to support the central argument of this thesis, which will be given at the end of this chapter. By doing so, it is also to provide another perspective to understand the variation of the meaning of the loose concept "public opinion" in different contexts.

5.1 Chinese Media with Limited Independence and Freedom: What Is the Impact of Media on Public Opinion in Mainland China?

In the previous chapter, it was established that a lack of reliable information resources skews public opinion. A study of other controlled information resources e.g. the media might provide more evidence to support the argument that: public opinion is also subject to restrictions of and influence from the party state, which might reduce the ability of public opinion to influence the justice system in China. How far the media can have an impact on public perceptions towards individual cases and particular legal issues or how malleable public opinion is, depends on various elements, e.g. the nature and the degree of the freedom of the media, how familiar the ordinary people are with the issue, how much they trust the media, and the availability and credibility of any alternative information resources. This section will discuss the possibility of influencing or moulding public opinion through the control of the media and other alternative information resources in this authoritarian regime.

Conventionally, the role of the Chinese media is described as the "throat and tongue" (the mouthpiece) of the CPC and the government. The role of the Chinese media has changed to some extent through commercialization, which was started at the end of the 1970s with the economic reform. Most scholars agree that the economic reform indirectly increased Chinese media's freedom.[807] The commercialized media are no longer fully funded by state subsidies but mainly funded by advertisements, which leads to more responsiveness to audience demands.[808] Commercialization has made more information resources available to the public, but it is still the public's choice about which

[807] Anne S.Y. Cheung, 'Public Opinion Supervision: A Case Study of Media Freedom in China', *Columbia Journal of Asian Law*, Vol. 20, No. 2, 2007, p. 366.
[808] Daniela Stockmann, *Media Commercialization and Authoritarian Rule in China* (Cambridge University Press 2013) p. 8.

resource they would like to use and trust. A study of newspaper readers in Beijing in 2004 found that respondents only read commercial newspapers if they only read one newspaper.[809] Apart from better entertainment coverage provided by the commercial newspapers, there is also a gap of credibility between the official CPC media and commercial media, and as a result, "public opinion is increasingly shaped by commercial rather than party media".[810] Stockmann has provided explanations for such phenomenon in her study on Chinese media and political communication: the commercialized Chinese media "brand themselves as trustworthy representatives of ordinary citizens, leading to greater credibility in the eyes of audiences" in China, which boosts "consumption and persuasiveness – especially among potential political activists", and "the same audiences that media are most responsive to are also the ones that tend to be most easily persuaded by political messages in the news", therefore "marketization strengthens the ability of one-party regimes to disseminate information and shape public opinion in a way conducive to their rule".[811]

However, commercialization does not allow complete freedom and independence for the media to become an independent watchdog of the party state. The CPC has established propaganda departments from central to local levels, which are in charge of the propaganda of the state ideology, overseeing and controlling the news media. The CPC still openly and frequently uses the term "propaganda" to describe the media's role. The vice-minister of the Propaganda Department of the CCCPC (the Central Committee of the CPC), Ji Bingxuan, clearly demonstrated that "the media's nature as the mouthpiece of the party and the people must not change, and the party supervising the media and the cadres must not change, we must ensure that the power of leading the news media is firmly within the party's hands"; and the media is still required to "direct" public opinion to a "correct" direction.[812] However, nowadays propaganda becomes more sophisticated and might not be always portrayed at propagandist rhetoric. Many party media have also

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809 David Bandurski, 'China's Yellow Journalism', *Far Eastern Economic Review*, Vol. 169, No. 5, 2006, p. 49-51; cited by Qian Gang and David Bandurski, 'China's Emerging Public Sphere: The Impact of Media Commercialization, Professionalism, and the Internet in an Era of Transition' in Susan L. Shirk (eds), *Changing Media, Changing China* (Oxford University Press 2011), p. 44.
810 Qian and Bandurski, 'China's Emerging Public Sphere', p. 49.
811 Stockmann, *Media Commercialization*, p. 4, 7.
812 Ji Bingxuan, 'Taking Great Effort to Get the Propaganda Work of 2007 Well Done' (努力做好 2007 年宣传思想工作) (*People.com*, January 25th 2007) <http://theory.people.com.cn/GB/41038/5327683.html> accessed March 13th 2013.

published various commercialized newspapers to attract readers, e.g. The *People's Daily*, the official media of the CPC, also publishes the *Global Times*, *Beijing Times* etc. The Southern Newspaper Media Group publishes the official newspaper of the CPC committee of Guangdong province – the Southern Daily, and also publishes the *Southern Weekend*, which is well known as one of the most outspoken newspapers in China.

Nevertheless, the party media has not given up efforts to maintain their influence. In practice, the government of each level, higher education institutions,[813] and other public organizations have to subscribe to party newspapers or journals, which is considered as a political task. For example, the secretary of the CPC committee of *Hainan* Province, Wei Liucheng, required that "every city and county, department, and work unit" should ensure the quota of the subscription must be done in 2009, in order to improve the party media's ability to direct public opinion and mobilize public support to the CPC's policies.[814] This is not an isolated example.[815] However, in 2003, the CPC has already enacted a document declaring its determination to deal with mandatory subscription of party newspapers or journals, in order to reduce the financial burden of the primary work units and peasants.[816] It is to deliver an image of the CPC of being considerate of the people rather than lessening efforts to indoctrinate or influence the public with the party dogma. It does not abolish the mandatory subscription; rather, it suggests setting up the maximum quota of subscription, publishing cheaper versions for villages, circulating some for free etc. It declared that some party newspapers which mainly rely on mandatory subscription would be closed down, however, it also declared that some of influence would still be published;

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[813] Propaganda Department of the CPC Committee of Xiamen University, 'The Announcement of Getting the Work of the Subscription of Priority Party Newspapers and Journals of 2013 Well Done' (关于做好二〇一三年度重点党报党刊订阅工作的通知) (*Xiamen University*, November 18th 2012) <http://gk.xmu.edu.cn/s/10/t/32/a/129111/info.jspy> accessed March 14th 2013.

[814] Ma Yingshan, 'Wei liucheng: The Distribution of the Party Newspapers and Journals Should be Done as a Political Task' (卫留成：把党报党刊发行列为重要政治任务) (*People.com*, October 31st 2009) <http://politics.people.com.cn/GB/1026/10293721.html> accessed March 14th 2013.

[815] 'General Administration of Press and Publication: All Parts of the Country Actively Arrange the Distribution of the Priority Party Newspapers and Journals' (新闻出版总署：各地积极部署重点党报党刊发行) (*Central Government*, October 30th 2012) <http://www.gov.cn/gzdt/2012-10/30/content_2254304.htm> accessed March 14th 2013.

[816] General Office of the CPC and General Office of the State Council, 'The Announcement about Further Handling the Newspapers and Journals of the departments of the Party and Government Spreading out in Disorder and Publication with Abuse of Power, in order to Reduce the Burden of the Grassroots Units and Peasants, by General Office of the CPC and General Office of the State Council' (中共中央办公厅、国务院办公厅关于进一步治理党政部门报刊散滥和利用职权发行，减轻基层和农民负担的通知) (*CPC*

and it suggests party newspapers improve the strategy of propaganda, so as to attract more readers, exert more influence on public opinion, and "on no condition leave any transmission channels to wrong thoughts and cultural rubbish which is against the party's principles and policies".[817] Regardless of whether or not the CPC can achieve this aim, its intention to influence and control public opinion is evident in this statement. This also explains why there is still ongoing mandatory subscription of party newspapers e.g. the previous example, as the purpose is the same.

However, propaganda or positive spin does not certainly improve public confidence in the CPC or the justice system. Stockmann and Gallagher have done a study on the effect of the Chinese media's coverage of labour law on people's perception towards the legal system. They find that "media representation can both encourage people to use the law but also lead them to leave the legal process with a heavy sense of frustration and disenchantment".[818] This is because, they argue, that the Chinese mass media has portrayed an overly positive image about the legal system, which has encouraged people without pre-held knowledge of labour law (which was quite new) to appeal to the legal system to solve their disputes or grievances. However, due to the state's desire of positive propaganda, the media did not report the problems of implementation "which is in part a function of the weakness of courts and in part a symptom of systemic corruption and close relationships between local companies and local governments"; and therefore the gap between positive expectation and problematic reality leads to frustration of the people who have resorted to the legal system driven by grievance.[819] Therefore, even if the media is employed for propaganda purposes, it does not always return a better public perception; on the contrary, it might even increase the risk of diminishing public confidence.

The example given above is an issue which was completely new to most people at that time. Stockmann and Gallagher also argue that as labour law and labour disputes are relatively new to Chinese citizens, they use media information to "form an opinion rather than to confirm previously held beliefs", while they show more resistance to media influence on other more familiar issues, "especially when the official line and citizens'

News, July 15th 2003) <http://cpc.people.com.cn/GB/64162/71380/102565/182145/11001546.html> accessed May 14th 2014.

[817] ibid.

[818] Daniela Stockmann and Mary E. Gallagher, 'Remote Control: How the Media Sustain Authoritarian Rule in China', *Comparative Political Studies*, Vol. 44, No. 4, 2011, p. 447.

preheld opinions conflict".[820] Therefore, they argue that "people might become more resistant over time to media messages that do not accord with what they hear firsthand by friends, colleagues and neighbours".[821] This thesis agrees that ordinary people do not just passively believe whatever they have received from the media. This example suggests that relevant knowledge, pre-held personal beliefs, direct or indirect experience might also affect how the public react to information from the media. Grapevine news might also have an impact, which will be developed later when discussing public perceptions towards corruption in China in this section. Therefore, the media's influence on the public's perceptions towards the justice system is a rather complex picture in China.

The example above is an example of civil law. How media can influence the public's perceptions towards criminal justice system might differ, as most ordinary people are unlikely to have direct contact with the criminal justice system if they are not victims or offenders/their close friends or family or serve as jurors/PAs. Under these circumstances, the stories told by the media and rumours or grapevine news on the internet might have an impact. This thesis will study corruption cases as an example. Before going any further, this thesis notes that the term of corruption used by the ordinary people is different from the legal term of corruption in Chinese criminal law. The former is a loose concept and includes any improper behaviour of the government officials e.g. bribery and malfeasance etc.[822] This thesis will use the loose concept in this section unless otherwise specified.

As a result of commercialization, the media has an incentive to deliver coverage of corruption for market share.[823] However, news coverage of corruption cases might risk undermining public confidence towards the CPC. Therefore, how to avoid the negative effect but to demonstrate the CPC's determination to handle corruption and boost its legitimacy becomes an issue for the CPC. The effect partly depends on how the coverage is delivered. There are several characteristics of Chinese media's reporting on corruption, which could illustrate how the media is employed for propaganda purposes, how the

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[819] ibid, p. 448.
[820] ibid, p. 450, 457.
[821] ibid, p. 458.
[822] Jiangnan Zhu, Jie Lu, and Tianjian Shi, 'When Grapevine News Meets Mass Media: Different Information Sources and Popular Perceptions of Government Corruption in Mainland China', *Comparative Political Studies*, Vo. 46, No. 8, 2013, p. 922-923.
[823] Benjamin L. Liebman, 'Watchdog or Demagogue? The Media in the Chinese Legal System', *Columbia Law Review*, Vol. 105, No. 1, 2005, p. 121.

propaganda is becoming sophisticated, and how Chinese media's freedom is restricted, in order to lead the public perception to the desired direction by the CPC.

The first characteristic is, argued by Zhu Jiangnan *et al.*, that "instead of being presented as the result of institutional deficiencies and symptoms of a more systematic phenomenon, reported corruption cases are generally treated as isolated incidents and attributed to each convicted official's personal problems and lack of self-discipline"; and "the singular cases that have been covered by the media actually demonstrate the intention and efficacy of their government in rooting out all corruption".[824] For example, when *Xinhua* published a summary of the Central Commission for Discipline Inspection of the CPC (CCDICPC) about the corruption cases in the past thirty years, it stated that after the economic reform "some cadres of weak wills cannot resist the impact of the economic and were rapidly corrupted", and "investigating into and punishing the major corruption cases… demonstrates the determination and the great efforts of our party to fight against corruption and has improved public confidence in the struggle with corruption".[825] However, Zhu Jiangnan *et al.*'s argument needs further clarification of "institutional deficiencies", which refers to the political system in its context. The coverage of the state-run media e.g. *Xinhua* or its coverage on the high-ranking CPC members' speeches did recognize the importance of improving the system (in other words, dealing with institutional deficits) and restricting power to deal with corruption.[826] The CPC has openly acknowledged the importance of relying on a better anti-corruption institution or system.[827] The "institutional deficiencies" that the Chinese state-run media or the CPC refers to does not suggest a fundamental change of the political system i.e. one party's monopoly of the power, but running repairs of details of the system. Any attack on the CPC's leadership for corruption is politically wrong and will be avoided by the media in

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[824] Zhu, Lu, and Shi, 'Grapevine News', p. 927, 934.

[825] 'The CCDICPC Reviews the Thirty-Year Experience of Anti Corruption and Redressing Mishandled Cases High-Ranking Officials Chen Xitong etc. Have been Removed' (中国纪检 30 年反腐平反回顾 陈希同等高官落马) (*Xinhua*, December 3rd 2008) <http://news.xinhuanet.com/legal/2008-12/03/content_10449710.htm> accessed April 15th 2013.

[826] Wang Ganwu *et al.*, 'The Delegates Discussed Handling Corruption by Institutions' (代表委员纵议用制度之笼"关"腐败) (*Xinhua*, March 5th 2013) <http://news.xinhuanet.com/mrdx/2013-03/05/c_132209476.htm> accessed April 15th 2013.

[827] 'The Overview of Work that has been Done to Construct the System of Punishing and Preventing Corruption since the 17th National Congress of the CPC' (党的十七大以来惩治和预防腐败体系建设工作综述) (*Xinhua*, October 17th 2012) <http://news.xinhuanet.com/lianzheng/2012-10/17/c_123832240.htm> accessed April 15th 2013.

China. The statement of this characteristic would be clearer if it uses "the leadership of the CPC" instead of the vague "institutional deficiencies". For example, the wording of a comment on Chen Xitong's corruption case is that "our party has determination and capability to remove the corrupted members and our socialist system is able to clear corruption which emerges within it".[828]

The second characteristic is that both the party media and mass media are keener on reporting local government officials corruption cases especially that of low raking officials, but are relatively mute on reporting high ranking government officials' corruption cases. Many scholars have acknowledged the rise of investigative reporting and argue that Chinese media plays an important role on exposing local government officials' corruption, as the central government attempts to curb the widespread corruption of local governments and encourages the media to expose them.[829] This might explain the findings of an empirical study that the respondents perceive the local governments are much more corrupt than the central government.[830] In this study, more than a half of respondents do not know how widespread corruption is in the central government and nearly 40% respondents think not many people in the central government are corrupt or they are not corrupt at all; while almost 40% respondents perceive that corruption is fairly common in local governments or seems like everyone is corrupt; given the fact that among the respondents who do not have any personal experiences with corruption, 56.78% get information about corruption from the mass media.[831] This is not surprising, as news reporting of corruption could be politically sensitive. The Chinese media cannot step over the lines which are not always clear, as they are commercialized without independence.

Scholars note that most reporting is about low ranking government officials.[832] It is usually described as "hitting flies rather than hunting tigers", i.e. officials of low levels are more likely to be subject to public scrutiny and hold accountable than officials of high

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[828] 'July 4th 1995, the CCCPC Decided to Investigate Chen Xitong' (1995 年 7 月 4 日 中共中央决定对陈希同同志进行审查) (*CPC News*, NA) <http://cpc.people.com.cn/GB/4162/64165/67447/67458/4555954.html> accessed April 15th 2013.
[829] Susan L. Shirk, 'Changing Media, Changing China' in Susan L. Shirk (eds), *Changing Media, Changing China* (Oxford University Press 2011), p. 19-22.
[830] Zhu, Lu, and Shi, 'Grapevine News', p. 923-924.
[831] ibid.
[832] Liebman, 'Watchdog or Demagogue', p. 31; Zhu, Lu, and Shi, 'Grapevine News', p. 927.

levels.[833] Apart from the administrative ranking of the criticised target, the media's hierarchical status also matters. Generally, the priority is assigned to the party and state media at the provincial level and above.[834] The reason is, as the General Office of the CPC (GOCPC) clearly demonstrates, that "the mainstream media including the party newspaper and journals, radio stations and television stations etc. should play their role in supervision by public opinion fully effectively, and supervision over the tabloid and websites should be reinforced".[835] However, what counts as tabloid is not specified. Liebman notes that compared with higher ranking media, local media is more careful about reporting corruption.[836] Even when reporting local corruption, local media are more likely to report corruption outside of their local jurisdictions.[837] And the media are more likely to criticise officials of lower administrative ranking than themselves.[838] The central media like China's Central TV (usually referred to as CCTV) has more power to publish coverage all over China, but this does not suggest they are watchdogs as they still have their forbidden areas: Beijing and Shanghai,[839] where the most important CPC figures are. This is because the CPC uses the media to oversee the local officials[840] rather than cause damage to its image.

Apart from corruption cases, the Chinese media are generally very reserved about reporting sensitive cases within their jurisdiction, e.g. She Xianglin's case. Shortly after She's wife – the "deceased" victim of the murder came back to the village alive and appalled the people, an urgent ban of investigative reporting on this miscarriage of justice was issued to the local media that "media must not interview or publish any coverage before the formal conclusion of the investigation is released"; subsequently, a local newspaper based in the same province claimed that they had received a "standard draft" titled "about the miscarriage of justice that She Xianglin was convicted of murdering his

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[833] Cheung, 'Public Opinion Supervision', p. 381-382.
[834] General Office of the CPC, 'Suggestions on Improving the Work of Supervision by public opinion' (关于进一步加强和改进舆论监督工作的意见) (*CPC News*, April 5th 2005) <http://cpc.people.com.cn/GB/64162/71380/102565/182147/11002949.html> accessed May 15th 2014.
[835] ibid.
[836] Liebman, 'Watchdog or Demagogue', p. 126.
[837] ibid.
[838] Benjamin L. Liebman, 'Changing Media, Changing Courts' in Susan L. Shirk (eds), *Changing Media, Changing China* (Oxford University Press 2011), p. 153.
[839] Cheung, 'Public Opinion Supervision', p. 381.
[840] Shirk, 'Changing Media', p. 19-22.

wife”, from the local PLC of Jingshan County.[841] However, while the local media had to keep mute on this high profile case, numerous media from other regions all over China had published extensive reporting on this case and they were also widely available on the internet.[842] This also suggests that it is easier for local media to publish negative reporting on other regions, as the local authority’s restriction on reporting cannot effectively cross the region. The law of contempt of court is not established in mainland China. In practice, Chinese media has to follow regulations (examples will be provided in the second part of this chapter) or instructions for individual cases from other authorities as discussed previously in this paragraph.

The third characteristic is the information control. When reporting high profile corruption cases, all the Chinese newspapers are usually required to use the “standard draft” (*tonggao*) provided by the state news agency – *Xinhua* News Agency, e.g. the corruption case of the former party secretary of Shanghai -- Chen Liangyu,[843] and the corruption case of the former vice-mayor of Beijing -- Liu Zhihua.[844] Investigative reporting is not desired, as corruption cases of high ranking politicians are usually sensitive and might involves details or other scandals that the CPC would not let the public know, and no politicians involved want to be dug out or let the scandal get out of control.

The fourth characteristic is that although there is very few investigative reporting, a lot of coverage on corruption often starts emerging after a gesture from the authority e.g. the person is prosecuted or convicted, especially the high ranking officials. This kind of coverage is of strong propaganda nature, as corruption cases of high ranking government or party cadres are likely to draw extensive attention, and the reporting could be used to demonstrate the CPC’s determination and effort to reduce corruption with attempt to improve public support e.g. Chen Xitong’s case, which has been given at the discussion of the first characteristic.

When the formal media coverage is restricted, the public might turn to the rumours or grapevine news as an alternative information resource, which is subject to fewer

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[841] Lv Zongshu, ‘Journalists’ Investigation: The Miscarriage of Justice of She Xianglin was “Guilty of Murdering His Wife”’ (记者调查：佘祥林“杀妻”错案) (*People.com*, July 27th 2005) <http://media.people.com.cn/GB/22114/47850/47855/3572767.html> accessed February 23rd 2013.
[842] ibid.
[843] Zhu, Lu, and Shi, ‘Grapevine News’, p. 927.

restrictions. This also has an impact on public perceptions towards corruption: generally people with access to grapevine news have more negative perceptions towards corruption than people without such access.[845] However, the facts are more complex, as controlled media reporting and propaganda can reduce the negative impact of the "grapevine news".[846] Therefore, Zhu Jiangnan *et al.* argue that "the party state can still effectively shape people's perceptions of government corruption through their propaganda and mobilization via the controlled mass media", i.e. controlled media coverage of corruption could possibly reduce the people's perceptions of corruption.[847] Therefore, the example of corruption cases suggests that the party state is able to influence public opinion on particular legal cases or legal issues through the control of media.

This thesis agrees that public opinion is malleable. However, contrary information does not always necessarily lead to attitude changes. An example is a lot of postings/expression on the internet about their antipathy against the overall negative reporting and commenting of Wang Lijun's trial, who was a close ally and follower of Bo Xilai, although the public attitude towards this case is divided. Before Wang's fall, he was portrayed as a hero of the police in numerous media coverage,[848] especially during the anti-mafia campaign when he was the head of Chongqing's police. He has received a frequently mentioned nickname in the media – "anti-mafia hero".[849]

Wang's fate has rapidly changed after his fleeing into the US consulate for asylum. Subsequently, he reported Gu Kailai's involvement in the murder of the British businessman Neil Heywood, which he covered up. After Gu was found of guilty, his covering up also led him to be tried, with other charges. The next day of the trial, the state news agency *Xinhua* published a news report about the case. Apart from stories of each charge against Wang, it also delivered a message to the public: Wang had a fair and public trial, as both his rights and equality of the prosecution the defence were well respected

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844 Qian and Bandurski, 'China's Emerging Public Sphere', p. 44-45.
845 Zhu, Lu, and Shi, 'Grapevine News', p. 938.
846 ibid.
847 ibid, p. 18.
848 He Yong *et al.*, 'Anti-Mafia Mayor Wang Lijun: Talented both Mentally and Physically and Had Hero-Worship from Childhood' (打黑市长王立军：文武双全从小就有英雄情结) (*People.com*, June 17th 2011) <http://politics.people.com.cn/GB/14562/14930627.html> accessed March 18th 2013.
849 '"Anti-Mafia Hero" Wang Lijun is Appointed to be the Vice-Mayor of Chongqing' ("打黑英雄"王立军出任重庆市公安局长) (*Xinhua*, May 27th 2009) <http://news.xinhuanet.com/legal/2009-03/27/content_11080938.htm> accessed May 15th 2014.

throughout the trial. [850] According to *Xinhua*'s reporting, Wang confessed and was remorseful at the trial.[851] After the sentence was announced, Wang expressed straightway that he would not appeal.[852] Wang's co-operation at the trial suggests this might be a show trial. However, the state media still toasted the triumph of the rule of law in China. The *CPC News* asserted that this trial demonstrated the CPC's determination to handle corruption and uphold the rule of law, which would improve public confidence in the rule of law.[853] However, there is no evidence to support that the Chinese public agrees with such assertions by the state media or have developed more confidence in the justice system. Even according to the story released by the official media, Wang's abuse of power for covering up a criminal case is undoubtedly a scandal. An editorial of the *Global Times*, a subordinate newspaper to the *People's Daily*, interpreted this as: justice always wins eventually, transparency is irresistible, and public confidence is improved.[854] When commenting on Wang's case and Gu's case, the official publication of the SPP -- the *Procuratorate Daily*, quoted words from the subsequent eighteenth national CPC meeting: "no matter whoever is involved, no matter the power, the position, as long as he or she breach the party disciplines and the law, they must be punished without any leniency".[855]

A commentator of the *Global Times* asserts that the Chinese are not interested in Wang's case anymore and China has moved on.[856] However, this is far from the fact. The public will not simply just accept what is disclosed by the state media as the full story of the case. Other details beyond the facts established at the court are still sensitive issues and investigative reporting is still tightly controlled. *Southern Metropolis Weekly* has

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[850] Li Bin and Yang Weihan, 'On the Scale of Law – The Whole Story of the Hearing and the Case of Wang lijun' (在法律的天平上--王立军案件庭审及案情始末) (*Xinhua*, September 19th 2012) <http://news.xinhuanet.com/legal/2012-09/19/c_113136404_3.htm> accessed March 13th 2013.
[851] ibid.
[852] Li Bin and Yang Weihan, 'Wang Lijun has Received Fifteen-Year Imprisonment after the Trial' (王立军一审获刑十五年), *The People's Daily (Overseas Edition)*, September 25th 2012, p. 04.
[853] Ni Yangjun, 'Wang Lijun Received Punishment for Four Charges It Shows the Sprits of the Rule of Law' (王立军"四罪并罚"彰显法治精神) (*CPC News*, September 19th 2012) <http://cpc.people.com.cn/n/2012/0919/c241220-19043909.html> accessed March 18th 2013.
[854] 'Editorial: Wang Lijun's Case, Justice is the Last Stamp' (社评：王立军案，正义是最后一个图章) (*Global Times*, September 20th 2012)<http://opinion.huanqiu.com/1152/2012-09/3131180.html> accessed May 15th 2014.
[855] Wang Zhiguo, 'Punishing the Persons who Trample on Law Severely to Preserve the Dignity of Law' (严惩践踏法律者维护法制尊严), *Procuratorate Daily*, January 7th 2013, p. 1.

managed to publish an issue which released detailed investigative reporting about Wang's abuse of power, hostility against journalists, propaganda strategy etc. However, after it was sold out in a few days, it was censored. When searching for the report using the biggest search engine in China, it always returns that "according to relevant law and policy, some results are not displayed". Perhaps, the CPC noticed the difficulty of taming public opinion in this kind of cases. Their strategy thereby is to simplify and re-interpret what is known, and to cover up what is unknown, attempting to avoid increasingly frustrating the public.

When Wang was in charge of Chongqing's police system, several citizens were sent to the re-education labour camp by the police for their speech/postings on the internet, which will be discussed in the third section. Wang also encouraged the individual police officers and the institution to sue journalists and media who "twist" the facts in reporting.[857] After his fall and a suspected show trial, comment on his case is also censored due to its sensitive nature. This suggests that if the justice system fails to curb infringement on the freedom of speech and human rights, anyone could become the victim, however significant he or she is. Although Wang's speech is criticised now for its attempt to deter "supervision by public opinion" – public scrutiny, China has its distinctive understanding about the freedom of speech and public scrutiny, which will be developed in the next section.

5.2 The Media and "Supervision by Public Opinion" in Mainland China: Supervision under the Supervision of the CPC

"Supervision by public opinion", or *yulun jiandu*, is a commonly encountered rhetoric in China's state ideology, which literally means public scrutiny of legislation, administration, or the administration of justice in the socialist party-state. It introduces public opinion to meet law and the justice system in China, e.g. Cheung categorizes public

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[856] Shan Renping, 'Extraordinary Plots, Certain Justice' (离奇的案发情节，确定的司法正义) (*Sohu*, September 6th 2012) <http://star.news.sohu.com/20120906/n352454315.shtml> accessed May 15th 2014.

[857] Yu Song, 'The "Double Suing" is only Aimed at Misrepresentative Reporting' ("双起"只针对歪曲报道) (*Oriental Morning Post*, November 19th 2010) <http://www.dfdaily.com/html/33/2010/11/19/538939.shtml> accessed on March 20th 2013.

opinion's influence on the court's decisions into supervision by public opinion.[858] However, the reality is more complex than what the concept literally suggests, as "supervision by public opinion" should always be under the leadership of the CPC. The CPC always asserts that it is the representative of the fundamental interest of the public, and therefore supervision by public opinion should be under its leadership or guidance. Therefore, this thesis argues that public opinion and the Chinese media hardly can be an independent external check on the state power and the party's policy and action and it is thereby different from what public and media scrutiny is in liberal democracy. In a word, the so called "supervision by public opinion" is supervision under the CPC's supervision. This section will develop this and the argument that the Chinese public only has a limited ability to scrutinize the CPC and the judiciary which is under its leadership; public opinion thereby lacks the ability to directly influence the administration of justice. On the contrary, sometimes supervision by public opinion might be used as a rhetoric tool by the CPC to legitimate its influence on the judiciary, when the CPC represents the populist view and intervenes in a case. The CPC is able to intervene in a case for a particular decision, as established in Chapter 3.

Supervision by public opinion is often carried out by the media's reporting, e.g. the media exposing local corruption, which has been discussed in the previous section. However, this thesis argues that "supervision by public opinion", to a greater extent, is a rhetorical tool for the CPC to demonstrate its responsiveness to the public will and a varnish of public scrutiny, as media reporting is subject to its influence or oversight, which is evident in various regulations and policies. For example, *the intra-party oversight regulations (tentative regulations)* provide that media should carry out its function of supervision by public opinion under the leadership of the CPC, and "the news media should uphold the principle of the party spirit… grasp the correct orientation of supervision by public opinion, pay attention to the social effects of supervision by public opinion".[859] This is reinforced by the General Office of the CPC (GOCPC), which gave suggestions on "carrying out supervision by public opinion correctly… maintaining a good image of the party and the government… maintaining social stability", [860] although

[858] Cheung, 'Public Opinion Supervision', p. 358.
[859] Central Committee of the CPC, *The intra-party oversight regulations (tentative regulations)*, December 31st 2003, Article 33 and 34, Section 8, Chapter 3.
[860] General Office of the CPC, 'Improving the Work of Supervision by public opinion'.

what is correct is not elaborated. However, news coverage of judges, police officers, and government and party cadres' misbehaviour and illegal acts, e.g. corruption and torture, would damage their image and diminish public confidence, which is in contradiction to "maintaining a good image of the party and the government". Therefore, although the CPC asserts that they support exposing corruption, malfeasance, and behaviour which is against the interest of the people etc., the image-maintaining aim would dilute the effect of public scrutiny, as it calls for selective and skilful reporting for such contradictive functions. An example is the requirements of the State Administration of Radio, Film, and Television (SARFT) on what can be reported and how to report and what cannot be reported.

The SARFT requires the media not to report "the problems that cannot be solved at the present stage", "being cautious about supervision by public opinion during major political events and special sensitive period in case any possible negative effect", ensuring a correct point of view, and "avoiding too much scrutinizing reporting during a certain period in case that it might lead to an illusion of piles of problems"; rather, what should be selected are "the issues that party and the government give high regard to and the problems that the people… wish to be solved and could be solved".[861] The SARFT is also very cautious about critical coverage of particular leaders and cadres by clearly naming them, and such programmes should be submitted to the superior party committee and the chief of the broadcasting or television institution for approval; as they aim to maintain the image and prestige of the leaders and cadres and social stability.[862] In order to minimize troubles that journalists might create, the SARFT forbids the media to take video or make recordings in secret.[863] This increases the difficulty for journalists to get evidence for investigative reporting of e.g. corruption.

Apart from these general restrictions on paper, the Chinese media are subject to supervision and more specific instructions of the central and local propaganda departments of the CPC in practice, who ensure the media coverage does not undermine the image of the party-state. For example, Zhang Zonghai, the former head of the

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[861] SARFT, 'Requirements on Effectively Improving the Work of Broadcasting and Television Institutions on Supervision by public opinion' (关于切实加强和改进广播电视舆论监督工作的要求) (*SARFT*, May 10th 2005) <http://www.sarft.gov.cn/articles/2005/05/10/20070919171216440790.html> accessed May 15th 2014.
[862] ibid.

propaganda department of Chongqing, asserted that the propaganda department would make plans and instructions of "relatively strong operability" regarding the subject matters of supervision by public opinion and issue them to media; and the time and degree of supervision should be managed by the propaganda department.[864] Media scrutiny can hardly be an independent check if the subject can instruct the media what to scrutinize and what not to.

More specifically, with regard to reporting on high profile cases, the SARFT requires that all the broadcasting and television institutions should "conduct the propaganda and reporting strictly according to the general arrangement and requirement of the Central Committee of the CPC (the CCCPC), and whatever they are not sure about should be presented for instructions".[865] If the information resources are tightly controlled, it would be very difficult for the public to develop their own opinions about the case. In a survey, Chinese journalists expressed that the major intervention of the legal news reporting is from the propaganda department or its top level leaders, e.g. they have to get approval from the propaganda department to conduct an interview or they get instructions not to report a particular issue.[866] Therefore, Chinese legal news reporters perceive the major problems of legal news reporting are "too much propaganda reporting and insufficient critical reporting" and "inadequate scrutiny toward the adjudicative organs"[867]. Under such circumstances, the criticism of public opinion being biased ignores the real problem.

However, one might argue that the courts did render decisions which met the populist expectations in several cases. As established previously in the first part of this chapter, commercialization leads the Chinese media to be more responsive to audience demands. Therefore, it might represent the populist views of justice sometimes and constitute pressure on the courts. Chinese judges did complain that it is difficult for them to resist the pressure from the media, but they gave the reason that the CPC leaders could

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[863] ibid.

[864] Zhang Zonghai, 'Deliberately Making Overall Plans and Coordinating Making a Good Job of Supervision by public opinion' (精心统筹协调 搞好舆论监督), *News Front*, No. 12, 2003, p. 7-8.

[865] SARFT, 'Requirements'.

[866] Yao Guangyi, 'The Current Situation of Media's Scrutiny toward the Administration of Justice from the Perspective of Journalists – A Survey Report of Legal News Reporters' (记者眼中的媒体司法监督现状——对部分法制新闻记者的问卷调查报告), *Journalists*, No. 9, 2011, p. 63.

[867] ibid, p. 66.

instruct the court to take the media's view to decide the case, and complain that "the media are just as corrupt as those in the courts and those journalists are often ignorant of law".[868] Therefore, it is not surprising to see that half of the respondents in a survey perceive the courts are increasingly resistant to the media, and most of them assert that courts refuse to help journalists through various excuses e.g. limited seats etc., the courts restrict interviews with judges on purpose, and very limited access to the time of a trial etc.[869] This suggests that Chinese courts are in fact very reluctant to facilitate the media's scrutiny out of practical concerns, although they often demonstrate the attitude that they "welcome" the media to scrutinise them.[870]

Therefore, the impact of the media's reporting on public opinion is rather mixed. On the one hand, its limited ability of investigative reporting and its limited influence to present a case to the CPC's concern allows the possibility of public scrutiny. On the other hand, the negative effects cannot be ignored. The media's attempt to influence a case has to rely on the CPC's will and mind, which provides the CPC a political motivation to control the court especially in high profile cases of intense public opinion -- appealing to popular opinion for public support of the CPC and boosting their legitimacy. Therefore, as Liebman argues, media scrutiny becomes a sword of two edges, it might bring more fairness but also might reaffirm the CPC's oversight over the courts and diminish their independence.[871] Another negative effect is that Chinese courts show an increasing intention to resist the media's reporting, as is discussed above. There might be criticisms on the distinctive political system of China; however, Chinese media also has its own problems of credibility, e.g. corruption, fabricating facts etc. For example, Liebman argues that journalists are sometimes paid by a party in disputes to publish biased stories,[872] and "the media suffer from many of the same problems that undermine the effectiveness of law and governance in China: corruption, lack of ethical standards, rapid commercialization, lack of legal knowledge, and lack of oversight".[873] A more concrete

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[868] Liebman, 'Watchdog or Demagogue', p. 95-96.
[869] Yao, 'Report of Legal News Reporters', p. 65.
[870] Deng Hongyang, 'The President of the HPC of Henan Province: Sincerely Inviting News Media Journalists to Scrutinise the Court System' (河南省高院院长：诚邀新闻媒体记者监督法院系统) (*Xinhua*, August 26th 2008) <http://news.xinhuanet.com/legal/2008-08/26/content_9710929.htm> accessed May 15th 2014.
[871] Liebman, 'Changing Courts', p. 170.
[872] Liebman, 'Watchdog or Demagogue', p. 39.
[873] ibid, p. 124.

example is a local media's reporting of a case where a policeman shot ten villagers to death and a villager injured. After a guilty verdict was returned by the court with the death penalty, a local media published a coverage, which portrayed the victims as nasty bullies in an attempt to justify the policeman's shooting, and asserted that the local public were very sad at the decision and tens of thousands of people signed a petition to protest against the sentence; however, it was finally found out that the "signing to protest" was arranged by some individuals and very few people actually turned up.[874] Under such circumstances, some of the Chinese scholars expressed their admiration for the law of contempt of court in western countries and argued for restrictions on media's reporting.[875] This is where the very few tensions of media's reporting (or freedom of speech) and the court's impartiality comes from in China, which explains why there is a debate on public opinion and the judicial impartiality.

However, such tension is not a tension between the independence of each other as neither has independence, e.g. Liebman argues that Chinese media and courts are in similar positions that "they are both state institutions attempting to strengthen their autonomy within the confines of the CCP (CPC) oversight".[876] At this point, this thesis would re-stress that it is necessary to restrict the freedom of speech under very exceptional circumstances for the interest of justice e.g. by the law of contempt of court, *only if* there is an independent judiciary since otherwise it might become an excuse for potential abuse of state power to suppress the freedom of speech. Although a free press is not necessarily free from bias, and the western media might also have the potential to twist the facts or they even have already done so sometimes, such utilitarian concerns cannot reverse the protection of freedom of speech as a human right.

Moreover, although Chinese judges have expressed their concern about media pressure, they might also benefit from media pressure under particular circumstances. This thesis argues that the Chinese media with limited freedom could also be an external check on the infringement of their independence. For example, Li Huijuan, who was a judge of the IPC of Luoyang city, has announced the invalidity of a local regulation as it was in contradiction with the national seeds law in her judgment. Subsequently, the court

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[874] Zhang Shidi, 'On the Phenomenon of "Journalists are more Useful than Judges"' ("记者比法官有用"现象之我见), *Modern Law Science*, Vol. 22, No. 2, 2000, p. 143.
[875] ibid.

attempted to remove Li from her office, demanded by the embarrassed and annoyed provincial congress.[877] The media's reporting has made Li a national celebrity. Chinese judges are not entitled to pronounce on the invalidity of any legislation, however, Li's applying the state statute rather than the conflicting provincial regulation is in accordance with the principle that when the lower level law e.g. local regulation is in contradiction with the upper level law e.g. national legislation, the judge should apply the upper level law, which is affirmed by the Law on Legislation;[878] and therefore this punishment is still widely regarded as over harsh and unfair.[879] The media's pressure brought this case into the SPC's attention. After the SPC's intervention, Li finally came back to her job.[880]

Although the courts and the media scrutinize each other, their problems of impartiality excuse the ultimate referee of their disputes -- the CPC. This thesis is not attributing all the blame to the CPC as a particular political party, rather, its critique is on the political system where a party is superior to the judiciary and the media and has power to dominate their affairs. Within such a system, persecution of journalists by the state through abuse of the criminal justice system becomes possible, which suggests the inability of public opinion and the media to influence the justice system under some circumstances. From 2003 to 2012, according to the data of *the Committee to Protect Journalists*, 32 Chinese journalists have been jailed.[881] He Qinglian has studied several cases of persecution of journalists in China. She exemplified that the government has been controlling the media through e.g. blockading information, violence, capturing and confiscating outspoken newspapers that damaged their image, interpreting particular information as state secrets, arresting, jailing, or killing journalists etc.[882] However, she also noted that it is far from the entire truth as such information is generally not open.[883] Nonetheless, the Chinese media still showed their resistance to state censorship and

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[876] Liebman, 'Changing Courts', p. 172.
[877] Han Junjie, 'The Incident of Li Huijuan in Henan Arose Disturbance Again' (河南李慧娟事件再起波澜) (*China Youth Daily*, February 6th 2004) <http://zqb.cyol.com/gb/zqb/2004-02/06/content_813990.htm> accessed May 15th 2014
[878] Article 79, Chapter 5, The Law on Legislation of the PRC.
[879] Han, 'Li Huijuan'.
[880] ibid.
[881] Committee to Protect Journalists, '2012 Prison Census 232 Journalists Jailed Worldwide' (*CPJ*, December 1st 2012) <http://cpj.org/imprisoned/2012.php> accessed February 19th 2013.
[882] He Qinglian, *Media Control in China A Report by Human Rights in China* (中国政府如何控制媒体 中国人权研究报告) (Human Rights in China, 2004), p. 67-116.
[883] ibid, p. 67.

interruption, to negotiate more freedom. For example, in January 2006, the CPC shut down *Freezing Point,* an outspoken supplement to *China Youth Daily* which has repeatedly received criticisms from propaganda officials.[884] Subsequently, officials of China's most influential media wrote an open letter to support *Freezing Point*; in mid-February, it was allowed to re-launch but without two of its former chief editors.[885] At this point, one might ask why on the one hand the CPC permits limited freedom of the media to oversee the courts despite its various problems while on the other hand it remains its tight control over the media. Liebman argues that many of the state actors e.g. the courts are incompetent, corrupt and inclined to embrace institutional protectionism, which might undermine the legitimacy and effectiveness of the party state, and it is thereby a strategy to make them oversee each other in order to minimize external checks.[886] This thesis agrees with this argument, but would add that it is also to minimize the risk of social unrest although the social unrest is getting grave in China, as discussed in Chapter 3.

From what has been discussed above, the picture of the media, public opinion and the justice system is rather complex. The dramatic development of the internet and online media has also brought more complication to this picture, which will be analysed in the next section.

5.3 Changes Brought by the Internet: More Freedom or More Control?

5.3.1 The Rapid Growth of the Internet, the Internet Censorship, and Retaliation against Online Speech: Taming the Public

The dramatic growth of the internet has provided Chinese a new information resource and forum of public communication. Traditional print media also have established their own websites to publish news coverage and comments. The increasing popularity of online forums, blogs, micro-blogs (*weibo*, similar to Twitter), and social networking websites provide everyone an opportunity to be a news reporter and through which they can reach a more extensive audience. The Chinese are exposed to much more

[884] Qian and Bandurski, 'China's Emerging Public Sphere', p. 58.
[885] ibid.

information and more options of information resources than at any time in the past. News websites and blogs also allow readers to leave comments therefore they can serve as forums of public communication. Relatively less control of the internet compared with paper media expands freedom of speech. Here are some statistics from the China Internet Network Information Centre (CNNIC) for a more vivid picture: up to the end of 2011, the number of internet users, who are often referred to as netizens, has reached 513 million of which 26.5% are rural residents, and mobile netizens has increased to 356 million.[887] Only about 22% have accepted education at or above college level while the majority are the people of secondary school and high school education.[888] The persons aged 20 to 39 make up the majority of the netizens – about 56%.[889] Nearly a half of netizens use micro-blogs, more than 60% of netizens use blogs and personal online spaces, although it is reducing.[890]

Numbers of internet users on its own cannot tell everything about how the internet shapes public opinion, if they are indifferent to e.g. news and public issues. Entertainment is one of the main reasons why Chinese internet users browse the internet. However, what attracts their attention is more than entertainment, e.g. more than a half of bloggers expressed their main topic as social issues, and individuals' opinions more actively take part in the public events.[891] Apart from the numerous websites, blogs, micro-blogs, netizens also get information from instant messaging tools, e.g. QQ or MSN. However, this thesis also argues that how far the online information can have an impact on public opinion does not only depend on how prevalent the internet is, but also how much the Chinese netizens trust the information on the internet. According to a survey, nearly a half of readers trust information on blogs, most of the other half expressed semi-trust, and only about 4% give completely or almost completely negative answers.[892] This suggests that

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[886] Liebman, 'Watchdog or Demagogue', p. 125.
[887] CNNIC, 'The 29th Statistical Report of China's Internet Development' (第 29 次中国互联网络发展状况统计报告) (*CNNIC*, January 2012) <http://www.cnnic.cn/research/bgxz/tjbg/?ChannelID=> accessed May 15th 2014, p. 4.
[888] Ibid, p. 13.
[889] ibid.
[890] Ibid, p. 35-36.
[891] CNNIC, '2008-2009 China's Blog Market and Blog Behaviours Research Report' (2008-2009 中国博客市场及博客行为研究报告) (*CNNIC*, July 2009) <http://www.cnnic.net.cn/hlwfzyj/hlwxzbg/sqbg/201206/t20120612_27466.htm> accessed May 15th 2014, p. 31.
[892] ibid, p. 40.

the netizens generally have a relatively positive attitude towards the credibility of the online information, and therefore it is expected that online information could have an impact on public opinion.

Given the premise of the issues that the public are interested in and the perceived credibility of the online information, the speed of information transmission on the internet also contributes to its power in shaping pubic opinion. The flow of online information has effectively increased the authority's difficulty to cover up the truth and control the information which is adverse to them. Liebman exemplified that information might spread before a ban on reporting by a case of plagiarism.[893] Zhou Yezhong, a professor lectured to the CPC leadership on the constitution, was accused of plagiarizing the work of Wang Tiancheng, a constitution scholar and a political dissident who had been jailed for his involvement in establishing a rival political party. Wang sued Zhou but lost the case. The Central Propaganda Department banned the media to report this scandal and the result of the case, and a few journalists who still published coverage were punished. However, there were still extensive anonymous discussions about this case and suspicion of political interference into the case in the online forums and blogs, even after discussion about the case was removed from major websites.

Although information control is getting difficult, it is not impossible. The Chinese authority has employed technology methods e.g. the Great Firewall to block the unwanted overseas based websites and has established extensive and rigid internet censorship. They use sensitive words filtering to block information which might contain information that they prohibit to be accessible to the public, e.g. *falungong* or *liusi* (the Tiananmen incident of 1989). Information containing these words might not be published or displayed by search engines, which serves as an automatic pre-censorship. The internet service providers also self-censor their customer's information, as the authority holds them responsible for their customers' speech; otherwise, they could be warned or shut down.[894] The authority never publish or admit what words will be filtered. The internet service providers use both instructions from the authority e.g. the propaganda officials and their own discretion to set up lists of sensitive words.[895] In practice, any words which might

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[893] Liebman, 'Changing Courts', p. 156-157.
[894] Xiao Qiang, 'The Rise of Online Public Opinion and Its Political Impact' in Susan L. Shirk (eds), *Changing Media, Changing China* (Oxford University Press 2011), p. 207.
[895] ibid.

disclose the banned information could be filtered, e.g. after the Jasmine Revolution happened, driven by the authority's anxiety about its impact on China, any words related to jasmine e.g. jasmine tea were filtered.

Nonetheless, the authority still showed limited trust in the self-censorship of the internet service providers as they have also established the online police. The city of *Shenzhen* did so first, called *Jingjing Chacha* (appearing as two carton figures), where citizens can click these two carton figures to report online crimes to the actual police officers on duty and the online police can find out and delete "illegal and harmful" information.[896] Subsequently, many other Chinese provinces and cities have also established the online police.[897] The Public Security Ministry (PSM) also claimed they would set up online police on all major websites over China.[898] However, what counts as "harmful" information? There is plenty of media coverage highlighting the large number of pornography websites that the online police have shut down or prostitution messages that they have deleted;[899] however, the targeted "harmful" information is more than this. In a meeting on governing online information during the summer 2012, the head of the Beijing police -- Fu Zhenghua stated that "whoever fabricates and transmits political rumours, attacks the leaders of the party and the state or the current system, should be cracked down on severely according to law if the circumstances are serious".[900] This suggests a political motivation behind the online censorship, although it is not entirely political.

Apart from filtering information containing sensitive words, China also has blocked websites through the "Great Firewall" including pornography websites and many websites of non-sexual content especially international websites, the reason might be: it is more difficult for the Chinese authority to censor the content of international websites than domestic ones. When Chinese media have to keep mute on a sensitive issue, the international media could be an alternative information resource if accessible. However,

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[896] Hu Mou, 'Cracking Down on Online Pornography, The Story of "Virtual Police" on Duty' (打击网络色情 "虚拟警察"上岗记), *The People's Daily*, April 28th 2007, p. 09.
[897] Hu Mou, 'The Public Security Ministry will Popularize Shenzhen's Experience "Virtual Police" will Go on Duty in Eight Cities' (公安部推广深圳经验 "虚拟警察"将在八城市"上岗"), *The People's Daily*, May 15th 2006, p. 10.
[898] Hu, '"Virtual Police" on Duty', p. 09.
[899] ibid.

several international news websites are also blocked or often unavailable; and even on the websites which are available, it does not suggest every article is accessible from Mainland China.[901]

Anonymity on the internet can encourage people to speak without fear of being identified or any potential retaliation. However, anonymity is subject to increasing restrictions, with the assertions of protecting citizens from fraud and other online crime in China. From 2002, the Chinese have to provide their ID card to get access to the internet where commercial internet service is provided e.g. internet cafes, and the service providers have to check and keep a record of such information within a certain time.[902] In 2011, Beijing has enacted new regulations which require that any organizations and individuals must use their real identities to register accounts, publish and transmit information on micro-blogs; and operators are required to ensure registration information is authentic.[903] Although it is a local regulation, its impact is nationwide, as most major operators are located in Beijing. In 2012, four major Chinese micro-blog operators required all of their users to register or re-register by their real identity – name and ID card number; whoever fails to do so will not be able to publish anything on these micro-blogs.[904] Although people do not have to display their real identity on their micro-blogs, the authority is able to identify them if it wants to. It happened after micro-blogs had become very popular, which suggests that the control over the online information is getting tighter and updated with time.

Chinese internet users have also expressed their concern about restrictions and possible retaliation against their critical speech or reporting corruption. An official of the

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900 Zhou Xin, 'Whoever Attacks the Current System should be Cracked Down Severely if the Circumstances are Serious' (攻击现行体制情节严重者严打), *Beijing Times*, July 26th 2012, p. A03.

901 Jonathan Zittrain and Benjamin Edelman, 'Internet Filtering in China' (2003) Harvard Law School Public Law
Research Paper No. 62 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=399920> accessed May 15th 2014, p. 74.

902 State Council of the PRC, 'The Regulations on the Management of the Commercial Internet Service Sites' (互联网上网服务营业场所管理条例), November 15th 2002 <http://news.xinhuanet.com/zhengfu/2002-10/11/content_593298.htm> accessed May 16th 2014, Article 23.

903 Beijing Municipality, 'Several Regulations on the Management of the Development of Micro-Blogs in the City of Beijing' (北京市微博客发展管理若干规定), December 16th 2011 <http://news.xinhuanet.com/legal/2011-12/16/c_111249899.htm> accessed May 15th 2014, Article 9.

904 Suo Dongdong and Xue Song, 'Four Portals Have Confirmed that March 16th is the Deadline' (四门户证实 3 月 16 日为最后期限), *Guangzhou Daily*, February 8th 2012, p. AII1.

Standing Committee of the NPC asserted that such worry was unnecessary;[905] however, what has happened is hardly a pat on the public's back. From time to time, Chinese internet users get identified, arrested and detained because of the critical speech that they have published on the internet. One of the well known examples is a man called Wang Shuai who has published a poster on the internet about the illegal expropriation of farmland by his hometown government -- *Lingbao* from *Shanghai* where he worked, and the poster has attracted a lot of attention; however, the *Lingbao* police arrested Wang from Shanghai and took him back to *Lingbao* and put him under criminal detention for eight days for slander.[906] Although Wang finally received an apology from the police and received about RMB783.93 (approx. £75) state compensation, this is not a happy ending: thereafter he encountered difficulty in finding a job due to his record of criminal arrest and detention, and the victims of the illegal expropriation did not get what they deserved, as a result, he told a journalist that he would never again report any problems.[907]

Chinese courts also abuse their power and retaliate on citizens who speak against them. For example, Gao Guolong, who worked in *Shanghai*, has published posters on the internet criticising the court of his hometown -- *Suining* County; as a result, he was taken back to his hometown by two judges and two plainclothes police, then was put under detention for fifteen days and had to pay a fine of RMB 10,000 (approx. £1,000) for slander, according to article 102 of the civil procedure law (amended now).[908] The punishment is the maximum amount provided by the civil procedure law. However, the court's action is illegal. The particular article is one of the compulsory measures against the interference in civil litigation, in order to ensure the court can carry out their duty without obstruction. However, when Gao was punished, the case had already been closed.

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[905] Huo Xiaoguang, Chen Fei, and Cui Qingxin, 'The NPC: No Need to Worry about that the System of Using Internet by Real Name would Affect Reporting Corruption' (人大：不必担心网络实名制影响举报贪腐) (*People.com*, December 19th 2012) <http://legal.people.com.cn/n/2012/1229/c42510-20053191.html> accessed February 26th 2013.

[906] Wang Junxiu and Wang Di, 'A Poster Result in Eight Days in Detention' (一篇帖子换来被囚八日) (*China Youth Daily*, April 8th 2009) <http://www.cyol.net/zqb/content/2009-04/08/content_2613911.htm> accessed May 15th 2014.

[907] Tian Guolei and Ji Ling, 'I Would Never Report any Problems' (我再也不反映问题了) (*China Youth Daily*, December 28th 2009) <http://zqb.cyol.com/content/2009-12/28/content_3002846.htm> accessed May 15th 2014.

[908] Zhang Guodong, 'The Court Has Sent Staff to "Trans-provincially Pursue" a Netizen who has Put a Poster on the Internet' (法院派员"跨省追捕"发帖网民), *Southern Metropolis Daily*, August 25th 2011, p. AA21.

Gao complained that the court had failed to implement the agreement of the mediation made by the court, which was implementable as much as a judgment. It is difficult to understand why Gao's critical speech on the internet about the court's neglect of duty could "obstruct" its implementation work. The procedure is also illegal, as Gao was not within the jurisdiction of *Suining* Court, *Suining* court should request assistance from a court in Shanghai, and judicial police officers should send Gao to Shanghai's police for detention rather than take him back to their jurisdiction, even if the detention is legally necessary.[909] *Suining* court has received a lot of criticism for doing so.[910] However, an official of the *Suining* CPC committee asserted that it was to "direct the people to tell the truth" after they had introduced the project of "consulting the people about governing through the internet" (*wangluo wenzheng*).[911] It suggests that the truth or the truth that the courts and the government would like to hear is that they are flawless and there should be no complaint about them. However, if they are really doing a good job, why would they fear the people's speech?

None of the two examples above is the last example of ordinary citizens being the subject of official retaliation for their speech, and their experience is certainly not the worst. The law also provides excuses for the authority to retaliate on citizens speaking openly and critically. For example, the criminal law of China provides that it is a crime to "incite others by spreading rumours or slanders or any other means to subvert the state power or overthrow the socialist system".[912] There are citizens punished by this charge, e.g. Ren Jianyu, a village official, who witnessed various problems of the political system of the primary level, he had copied and transmitted hundreds of "negative messages" on micro-blogs and personal online spaces out of disappointment, and was arrested by Chongqing's police on suspicion of subverting the state power.[913] The evidence that the police obtained also includes a T-shirt with the printing of the Chinese translation of "give

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[909] SPC, 'Several Suggestions on Several Issues of How to Apply *the Civil Procedure Law of the PRC* by the SPC' (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的意见), Document Number [1992] No. 22 (法发[1992]22 号), July 14th 1992, Suggestion 114 and 115.

[910] 'Trans-provincially Pursue: The People will "Tell the Truth"?' (跨省追捕，人民就"说实话"？), *Shanghai Law Daily*, August 19th, 2011, p. A03.

[911] Zhang, 'Trans-provincially Pursue'.

[912] Article 105, Chapter 1, Part 2, The Criminal Law of the PRC, amended February 25th 2011.

[913] Wang Shiyu, 'The Past Events of Receiving a Charge' (获罪往事), *Southern Metropolis Daily*, November 28th 2012, p. AA33.

me liberty, or give me death" from Ren's home.[914] Ren did not get either but rather two-years of re-education through labour. This case appalled the public and received vehement criticisms from Chinese netizens and the media.[915] Ren was released before he served the full term, and the decision of re-education through labour was also withdrawn by reason that the decision was "inappropriate".[916] Ren sued the committee of re-education through labour of Chongqing, who demanded Ren to withdraw this lawsuit but was refused.[917] However, Ren's claim was dismissed by the court by the reason that Ren failed to present this case within the time limit provided by law, although Ren's lawyer argued that it was caused by "there was no lawyer in Chongqing dare accept Ren's case at that particular time".[918] Ren appealed but lost again. Ren's case is only one of the several reported cases of Chinese citizens who were punished for speech when Bo Xilai and his ally Wang Lijun were governing Chongqing.[919] Ren's case is also one of the many cases where citizens were punished for speech in China.

Apart from the criminal law, there are more specific regulations restricting the freedom of speech. The administrative regulations of the State Council prohibit internet users publishing or transmitting any information which "damages the state's honour and interests".[920] Beijing's regulation on micro-blogs re-states this ban, and it also prohibits information which "incites illegal assembly, association, parade, demonstration, assembling a crowd and disturbing the social order".[921] This regulation suggests the authority's anxiety about potential social unrest which might be facilitated by information flows on the internet. These are only a few examples of the various laws and administrative regulations provided to restrict the freedom of speech. Together with the authority's reaction to critical speech, evident by the examples given above, they suggest how fragile the authority's nerves are and their strong political panic over public

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[914] He Sanwei, 'Ren Jianyu: Released from the Re-education through Labour Camp' (任建宇：出劳教所记), *Southern People Weekly*, No. 41, 2012, p. 59.
[915] Liu Changsong, 'How can Forwarding other People's Micro-blogs Get Re-education through Labour' (转发微博怎能被劳教), *The Beijing News*, October 11th 2012, p. A04.
[916] He, 'Ren Jianyu: Released', p. 59.
[917] ibid.
[918] Su Xiaoming, 'Ren Jianyu's Lawsuit is Dismissed by the Reason that It is beyond the Time Limit' (起诉超期任建宇诉讼请求被驳), *Beijing Times*, November 21st 2012, p. A19.
[919] Zhang Xiaohui, Du Yuan, and Cheng Jiaojiao, 'Chongqing has Redressed Three Cases of Rehabilitation through Labour ' (重庆平反三宗劳教案), *The Economic Observer*, October 29th 2012, p. 010.
[920] State Council of PRC, 'Commercial Internet Service Sites', Article 15, Chapter 3.
[921] Beijing Municipality, 'Micro-Blogs', Article 10.

disaffection which might be triggered by the dissemination of critical speech especially on the internet and its impact on social stability – the potential challenge to their power and authority. A background is that China's booming economy has brought very mixed consequences. Ding Sheng argues that social injustice, corruption, lacking of political credibility etc. all contribute to a governance crisis for the CPC in recent years, and the CPC attempts to heed public opinion through the internet and return a better governance appearance.[922] The crisis of public confidence in the justice system is just part of the story, as the judicial power is a crucial part of power to maintain social control in China. Therefore, dealing with public opinion of legal cases and legal issues also constitutes part of the state's strategy to deal with the crisis of governance, especially when they confront a more opinionated and critical citizenship.

Western scholars have never ignored the censorship and various kinds of restrictions on the freedom of speech on China's cyberspace. Several Chinese scholars argue that one of the reasons for the government to oversee the internet and employ content-control technology is the "internet technology imperialism";[923] which indicates that "the political monopoly of the internet technology, i.e. the countries which have the core internet technology and powerful internet resources, transmit its political culture through the internet, influence or even control several countries' political culture, and then realize particular political aims".[924] Lou and Zhang also argue that the countries which export a lot of information try to indoctrinate their values and ideology to developing countries.[925] This suggests that China is concerned about the online information's challenge to its state ideology and its impact on changes of political beliefs.

However, the Chinese public does not just passively accept every restriction being imposed on them. Rather, they have been making endeavours to resist controls. The rise of public opinion on the internet also has a noticeable political and legal impact. Lei Yawen has studied *the 2007 China World Value Survey* data and has found that Chinese netizens

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[922] Ding Sheng, 'Informing the Masses and Heeding Public Opinion: China's New Internet-Related Policy Initiatives to Deal with Its Governance Crisis', *Journal of Information Technology and Politics*, Vol. 6, Iss. 1, 2009, p. 40-41.

[923] Yang Zhijun, Feng Zhaorui, and Xie Jinlin, 'A Study of the Reasons, Strategies, and Extent of the Government Overseeing and Restricting the Online Public Opinion' (政府规制网络舆论的缘由、策略及限度研究), *Study and Practice*, No. 8, 2011, p. 102-103.

[924] Lou Chengwu and Zhang Lei, 'Questioning to What Extent Online Democracy is a Fact' (质疑网络民主的现实性), *CASS Journal of Political Science*, No. 3, 2003, p. 69-70.

are more politically opinionated, critical, pro-democracy and more likely to get involved in collective action compared with traditional media users who do not use the internet and non-media users, and therefore become a new challenge to the authoritarian state.[926] Therefore, the internet could be powerful at mobilizing political opposition, and the political panic over the potential impact of the internet on public disaffection is not paranoia.

The critical speeches which have been discussed previously in this section suggests, as Lei also argues,[927] that not only the quantity but the content of the information on the internet affects the political and legal impact of the internet especially in authoritarian countries, as they are unlikely to be circulated by the paper media in China. Under China's rigid censorship, there is still negative information surviving from the censorship on the internet. They could serve as alternative information resources challenging indoctrination, and might even trigger intense public opinion and bring about reform. A typical example is the abolition of the detention and repatriation system driven by the public outrage at the death of Sun Zhigang. Before the tragedy happened, Sun just came to Guangzhou for a new job and did not have time to register for a Temporary Residency Permit (TRP). One day he failed to show his ID card and TRP to a local police officer, he was taken to a local police station and then sent to a repatriation station for "the migrants with no ID cards, no TRP, and under no employment" (*sanwu renyuan*). Sun died there, and the local authority insisted that Sun had died from illness at first. However, the journalists of the *Southern Metropolis Daily* found out that Sun was beaten to death and published an investigative report. The local authority had to re-open an investigation into this case and then prosecuted several suspects. Because Sun was a university graduate rather than a homeless person, it attracted extensive reporting about this case by Chinese media. This case triggered public outrage at the detention and repatriation system, which was finally abolished under great public pressure. This reform is not only at the price of Sun's life. Several editors and staff of the *Southern Metropolis Daily* were prosecuted on the charges of corruption and bribery, which has raised extensive doubts about the authority's motivation for retaliation. Therefore, as a result of the tight censorship and repression

[925] ibid, p. 70.
[926] Lei Yawen, 'The Political Consequences of the Rise of the Internet: Political Beliefs and Practices of Chinese Netizens', *Political Communication*, Vol. 28, Iss. 3, 2011.
[927] ibid, p. 296-297.

against dissenting speeches, public opinion's impact on legal reforms is expected to be limited. At this point, one might ask that how to recognize public opinion to conclude or evaluate its impact. This will be discussed in the next section.

5.3.2 Construction and Oversight of Online Public Opinion by the Party-State: Mist over Public Opinion

One of the questions most frequently encountered by research on public opinion is that of how to recognize public opinion. This thesis is not an empirical study on what public opinion on legal cases or any particular legal issues is. However, it aims to find out whether or not, and if so how, public opinion is influenced or constructed by the state especially in an authoritarian state such as China. In other words, it has to recognize the difficulty of recognizing public opinion rather than to treat public opinion as unproblematic. The aim of doing so is to establish that the debate within the Chinese scholarship on whether public opinion compromises judicial independence and impartiality in China lacks empirical evidence and is therefore a pseudo debate. This section will exemplify how the state attempts to oversee and construct public opinion on the internet.

It is difficult indeed to recognize what public opinion is in China. Lee Hsiao-wen argues that, although there are various organizations and private companies conducting public opinion surveys, the surveys' credibility is affected by the governments' oversight of the survey topic.[928] Hu Yong also argues that "since China never had mechanisms to accurately detect and reflect public opinion, blogs and BBS have become an effective route to form and communicate such public opinions of the society".[929] Although the online opinions could be a barometer of public opinion, the authority's direct involvement in constructing online opinions, e.g. internet commentators, makes it difficult to find out what the public actually think about solely by online speeches. It is reported that local governments, have recruited internet commentators (some internet commentators even were trained in Beijing) appearing as ordinary internet users to "direct" public opinion on

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[928] Lee Hsiao-wen, 'Public Opinion in China' (2012) *Chine Studies Centre of the University of Sydney Policy Paper Series Iss. 1* <http://sydney.edu.au/china_studies_centre/en/ccpublications/policy_paper_series/2012/public_opinion_in_china.shtml> accessed March 13th 2013, p. 10.

the internet; as, e.g. in Suqian city, when the local government started a campaign of "the public notification of a clean and honest government" and consulted public opinion, they received a lot of negative feedback especially on the internet.[930] The then vice-minister of the local propaganda department asserted that it was very effective, and another local cadre asserted that more and more local governments started to recruit internet commentators which remained unnoticed.[931] This practice suggests that the CPC and the government are attempting to dilute the critical speeches and influence and construct public opinion on the internet, as opinions published by the commentators they recruited would appear as part of the public opinion on the internet.

A piece of evidence might be the appeared public reaction to Google leaving the mainland for Hong Kong as a result of its refusal to filter its search results. Shirk has studied the event that Google made a high-profile statement threatening it would leave the country unless information filtering is not required, but the threats did not work and Google moved its search engine to Hong Kong.[932] At first there were a lot of posts on the internet supporting Google, but subsequently they disappeared and the internet was dominated by speeches against Google and the US's "information imperialism", and the propaganda department also asked academics to write supportive newspaper articles.[933] What happened suggests an attempt to create an image that Google's statement did not get public support.

The public are aware of the state's intention and have created a sarcastic nickname for the internet commentators – "the fifty-cent party", which satirizes as a metaphor that they are paid fifty-cents for every post they publish on line and becomes very popular on the internet. From then on, this word could be used to label and ridicule a person who speaks supportively about or sympathize with the authority. However, there is no evidence proving that every positive message is written by internet commentators, neither can we conclude that Chinese citizens disagree with the government on every single issue. Many internet commentators appear anonymous on the internet, although they could be

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[929] Hu Yong, 'Blogs in China', China Media Project Case Study, University of Hong Kong, August 4th 2005; cited by Xiao, 'Rise of Online Public Opinion', p. 217.
[930] Cao Junwu, 'Suqian: The Practice of Directing Online Public Opinion' (宿迁：引导网络舆论实践), *Southern Weekend*, May 19th 2005, p. T00.
[931] ibid.
[932] Shirk, 'Changing Media', p. 3-4.
[933] ibid.

identified by the authority. As a result, it is even more difficult to tell what public opinion is solely according to what is on the internet and to conclude that online public opinion can always influence the government or the courts.

A relatively new trend is the establishment of internet spokespersons in various local governments, police, procuratorates, and local courts. The details of how this works vary from place to place. Generally, an online forum is provided for the internet spokespersons to publish news and answer questions raised by internet users within a required time. So far, there is little evidence to tell its impact. There are both positive reporting[934] and negative reporting, e.g. bureaucratic answers, and a contentious notice on a forum is also reported that: "any messages published in the '*Sishui* E-Livelihood', if it is not sure whether it is true and calls for further investigation, in order to protect the legal rights and interests of the person or departments involved, they will be forwarded to relative departments in secret without exception, and the messages will be shielded".[935] A cadre explained that they had to shield messages if containing personal attacks or swear words, he also admitted that they did delete messages if they are overly radical.[936] It was not specified what counts as radical, which leaves room for the control of unpleasant opinions. Bureaucratic answers would also disappoint the people who come to them and are unlikely to improve their images. This new system does not replace the internet commentators. Rather, they might work with each other to exert more influence on the internet. For example, a county court declares that for highly concerned cases, they might arrange internet commentators to publish postings on the internet to "direct" public opinion "depending on the circumstances".[937]

As it is difficult to identify what public opinion really is, it also provides an opportunity for the authority to "represent" public opinion – asserting public opinion is what they would like it to be for certain purposes. In China, the term "public opinion" in the authority's statement sometimes becomes a rhetoric tool to justify a certain policy is

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[934] Bian Chengyu and Lu Jiangli, 'Zhenhai The Experiment of "the Internet Spokesperson System"' (镇海"网络发言人制度"实验), *Decision Making*, October 2009, p. 44-45.
[935] 'Sishui of Shandong has Established the Pilot Internet Spokesperson System Shielding "Sensitive Posters" has Triggered Debate' (山东泗水试行网络发言人制 屏蔽"敏感帖"引争议) (*Xinhua*, January 11th 2011) <http://news.xinhuanet.com/local/2011-01/11/c_12967064.htm> accessed May 15th 2014.
[936] ibid.

based on popular support and for public interests. However, such strategy is not always fruitful. For example, the Chairman of the Standing Committee of NPC, Wu Bangguo, asserted that "in the recent years that all aspects of the society strongly call for reinforcing the management of the online society and crack down on online crimes harshly".[938] Regardless of the public's attitude towards online crimes, it is doubtful that the Chinese public desire more oversight from the government, evident by the nationwide resistance against the mandatory installation of software called "Green Dam Youth Escort". It is content controlling software, which can filter pornography information for the youth, as claimed by the Ministry of Industry and Information Technology (MIIT). After receiving strong protests, it was made optional.

At this point, one might argue, even if the state does not take any efforts to restrict, influence, or construct public opinion on the internet, online speeches cannot represent public opinion. This thesis agrees that the opinions of internet users cannot always represent what the public actually think about a subject. The data of the Chinese internet users, given previously at the third section of this chapter, suggests that internet users are not representative of the population. However, the opinions which might have an impact on legal cases, legal issues, or public policies, are not necessarily the opinions of the entire public, given that there are members who stay mute or cannot make their voice heard, and the members expressing their opinions do not always agree with each other on every single issue. The so called "public opinion" might be the opinions of the media, the elites, the majority of the ordinary people, or even a rhetoric tool constructed by the state e.g. the case of China, which suggests that the debate on the influence of public opinion lacks what it presumes – that we know or can find out what the public is thinking about. This is one of the reasons why the debate on public opinion compromising judicial independence and impartiality within the Chinese scholarship is a pseudo-debate.

Another reason is that such debate ignores what really leads to a crisis of public confidence. Some of them are concerned about a dilemma that Chinese judges have to face, i.e. to give an independent decision according to the law and thereby frustrate the

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[937] 'The Court of Shaoxing County Has Taken four Measures to Establish the System of Internet Spokesperson' (绍兴县法院四项措施建立网络发言人机制) (*PLC of Shaoxing*, January 24th 2013) <http://www.sxzfw.gov.cn/art/2013/1/24/art_5629_370710.html> accessed February 20th 2013.

public or to bow to the public opinion to avoid a loss of public confidence. In the previous chapters, it is established that various problems of the judicial system e.g. a lack of independence of the judiciary, judicial corruption etc., which the ordinary people can learn through their own experience or the stories of other people's experience through media coverage, lead to a loss of public confidence in the justice system. In high profile cases where the decision of the court frustrates the public or falls outside their expectations, public awareness of such problems might invite their suspicions about any possible corruption, interference from the government or some influential and privileged individuals etc., which are often not groundless. Also, as established in the previous chapter, what the Chinese public want sometimes is more than a decision. If the truth remains undiscovered, even if the popular opinion is taken to make a decision, it will not necessarily improve public confidence. Chinese judges did show their struggling attitude towards public opinion, e.g. the president of the HPC of *Zhejiang*, Qi Qi, told the journalist that judicial independence includes the independence from public opinion, however, "the adjudication should not trample on the public opinion".[939] In fact, public opinion can exert pressure on Chinese judges not simply because of a lack of a thick skin, but the concern that intense public opinion might cause pressure from those who are able to have a significant impact on their career e.g. the CPC. Therefore, based on what has been discussed in the previous chapters especially in Chapter 3, this thesis argues that the problems of the judicial system itself are what really make the court or judges particularly weak before public opinion or pressure in China, nothing else, although the judges are not entirely responsible for such problems. The debate on public opinion's risk of compromising judicial independence and impartiality thereby distracts attention from the real problems.

As the reform of the judicial system is part of the political reform, and so far there is no sign to suggest that the CPC is putting its hands on a fundamental reform. It can be expected that these problems would still disturb the judicial system and affect public confidence. Under such circumstances, to maintain the authority of the judicial system –

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938 'Wu Bangguo: All Aspects of the Society Strongly Call for Reinforcing the Management of the Online Society' (吴邦国：社会各方面强烈呼吁加强网络社会管理) (*Chinanews*, March 8th 2013) <http://www.chinanews.com/gn/2013/03-08/4627911.shtml> accessed March 9th 2013.

939 Song Shijing, 'The President of the HPC of Zhejiang Suggested Legalizing Folk Debit and Credit' (浙江高院院长建议放开民间借贷), *The Beijing News*, March 11th 2012, p. A07.

the authority of the state resolving legal disputes and maintaining social order, the CPC has to seek other strategies to curb the negative image of the justice system and reduce the pressure on the party state. Chinese courts have been taking efforts to restrict the media's scrutiny. For example, the propaganda department and the HPC of Guangdong Province have published regulations restricting media's coverage, which forbid journalists to report pending cases and to publish commentary on decided cases which is in contradiction with the judgment.[940] This thesis agrees what Liebman argues, i.e. judicial independence becomes a rhetorical defence for the courts to resist the media's oversight and influences which is counter to their self-interests.[941] Liebman also argues that although many western countries also impose limitations on the media's reporting, the limited transparency and other problems undermining the authority of the courts in China will cause more damage.[942] This thesis would also add a further argument that the rhetoric of "judicial independence" might also be misused against critical speeches and public pressure, to ensure the judicial power will exclusively and safely stay within the CPC's hands, without of the risk of being divided by the people. It is to establish a judiciary independent from the people rather than the CPC, which distinguishes itself from the concern about public opinion's influence on the justice system in a liberal democracy. Therefore, the motivation behind this rhetoric hardly can lead to a progress towards the rule of law.

Concluding Remarks

Public opinion is subject to the influence from the media, especially on the issues which the public have no pre-knowledge or experience about. In China, the commercialization provides the media more motivation to publish investigative reporting for market share. However, Chinese media is still not independent and its freedom to scrutinize the state and the justice system is restricted. The media is subject to the instructions from the propaganda department; therefore, the so called "supervision by

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[940] Propaganda Department of the CPC committee of Guangdong Province and HPC of Guangdong Province, 'Several Regulations on Reporting Trial Activities of the Courts by the Propaganda Department of the CPC committee of Guangdong Province and The Higher People's Court of Guangdong' (中共广东省委宣传部、广东省高级人民法院关于规范采访报道法院审判案件活动的若干规定), Document Number Guangdong HPC (2003) No. 11 (粤高法发（2003）11 号), June 30th 2003, Article 4.
[941] Liebman, 'Watchdog or Demagogue', p. 149; Liebman, 'Changing Courts', p. 165.

public opinion through media" becomes a state ideology rhetoric and cannot prove that the public is able to exert direct pressure on the justice system through public scrutiny. The Chinese media still has to carry out propaganda function sometimes for a better image of the justice system and the CPC and avoid reporting on sensitive issues. Although the media cannot always be expected to represent public opinion, a free media could make at least some voice from the public heard. If the freedom to speak out is restricted, it is difficult to expect public opinion to come into sight and constitute a pressure on the court. Therefore, the concern that public opinion might become a risk to judicial independence and impartiality in China becomes groundless.

The dramatic development of the internet in China might bring more freedom of speech compared with the paper or traditional media. Everyone could be a news reporter on the internet. No one has to convince an editor to publish a particular story. The mass information and high speed information flows on the internet and a significant number of internet users allows the possibility of the internet being an alternative information resource and a public communication forum. However, driven by the concern that negative information and critical speech might diminish public confidence, the censorship and various controls over the internet arrive before a citizenship's thirst for more freedom. Although the internet makes it more difficult for the state to control information flow and as a result some information survives from the censorship, control still remains possible. Some Chinese citizens find themselves in prison or re-education through labour camp because of the critical speech that they have published on the internet. The intention is deterrence for any potential "trouble makers", and taming the public to stay silent on particular issues. Therefore, the development of the internet itself does not support the concern that public opinion will become a risk to judicial independence and impartiality, as high profile cases could be very sensitive topics and relevant information might be censored.

Apart from censorship and filtering unwanted information, the state is also directly involved into constructing public opinion through hiring commentators to publish positive messages on the internet who appear as ordinary internet users. This is to dilute the critical speech on the internet and to improve the image, or to mould "public opinion" and fabricate "public support" for a particular decision or policy. Public opinion thereby

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[942] Liebman, 'Changing Courts, p. 165.

becomes an ideological rhetoric rather what it literally suggests in the context of China. However, this also brings more difficulty to recognize what public opinion really is. Therefore, the concern that public opinion might constitute pressure on Chinese judges lacks reliable empirical evidence in this aspect. Moreover, this argument might be misused as a shield against public scrutiny of the justice system, and to preserve the monopoly of the judicial power within the hands of the CPC.

CHAPTER SIX

PUBLIC PARTICIPATION IN THE JUSTICE SYSTEM, PUBLIC OPINION, PUBLIC PARTICIPATION AND DEMOCRATIC VALUES: UNDERSTANDING LEGAL PRINCIPLES AND INSTITUTIONS IN CONTEXT

Introduction

In the previous chapter, it has been established that the debate about public opinion and judicial impartiality and independence within the Chinese scholarship is a pseudo debate, which distracts from the real problems affecting public confidence towards the justice system. Some of the problems of the justice system are acknowledged and criticised by Chinese scholars, against the western legal values or institutions. Possible reforms and the transplant of law or legal values are suggested or attempted to be justified by Chinese scholars by referring to the western wisdom and practice. In a time of globalization, it becomes very common that scholars seek wisdom and experience from other jurisdictions for improvement of their home legal institutions and practice. However, as law is a kind of social institution, this thesis argues that it is difficult to expect a successful outcome by simply cloning legal principles and institutions without either understanding them in their particular social, cultural, political, or systematic context or an understanding of the real problems in the home jurisdiction, or even whether or not a particular phenomenon indicates a problem.

Fei Xiaotong's classic work *From the Soil: The Foundations of Chinese Society* discusses a lawsuit where a man A beat another man B because of B's adultery with A's wife; as a result, B was injured and sued A. The judge felt it difficult to judge this case

simply by law, as what A had done was regarded as justifiable by the locals in the rural area. However, adultery was not a crime but A could be guilty of assaulting B. If A was punished, it would give the rural residents an impression that the law protects immoral people. Therefore, Fei argues that

> the current justice system has a very special negative impact on the rural area, it undermines the initial rule of ritual but fails to establish the rule of law effectively. The establishment of the rule of law cannot solely rely on the establishment of several laws or courts; how the people would use them is very important. Moreover, there should be reforms of social structure and people's thoughts and beliefs before the establishment of the rule of law.[943]

This book was first published in the 1940s. Details of this particular case might be out of date due to the significant changes in Chinese society. However, the argument derived from this case still makes very good sense. Zweigert and Kötz argue that different systems have their own "functional-equivalence" for similar legal problems, and such "functional-equivalence" might be an extra-legal phenomenon.[944] Therefore, legal reform might cause new problems rather than lead to improvements if it is operated without understanding of such "functional equivalence" in context but with a sentiment of superiority of a particular legal system. Moreover, if the reform breaches or suppresses the values and beliefs widely diffused within the society, it might even cause a crisis of public confidence in the justice system and affect the efficiency of the justice system. Therefore, this calls for great caution in comparative study; it is difficult to contribute to in-depth understanding of China if the Chinese legal system is simply evaluated against the western criteria, values, beliefs, or whatever else westerners might take for granted.

However, Nelken argues that the assumption of "functional-equivalence" could be misleading; two of the reasons are: sometimes "the 'problem' is not perceived as such" in other cultures and the culture can powerfully re-shape institutions and practice; and "often matters are 'problematized' only when a society is exposed to the definition used elsewhere" e.g. the same evidence might be used to justify different legal practice.[945] This

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[943] Fei Xiaotong, *From the Soil: The Foundations of Chinese Society The institutions for reproduction* (乡土中国 生育制度) (Peking University Press 1998) p. 58.

[944] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Clarendon Press1998) p. 34-36, 38.

[945] David Nelken, 'Comparative Criminal Justice' in Mike Maguire, Rod Morgan, and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5th edn, Oxford University Press 2012) p. 149.

might constitute one of the reasons why the Chinese system looks extremely problematic when simply tested against the western criterion, and there might be different perspectives about the "problems" in a particular system or culture, (what is regarded as a problem in the English legal system might not be perceived as a problem in the Chinese legal system, or the other way around) which will be developed in this chapter.

Apart from the sociological significance of context, there are another two reasons for avoiding simply evaluating the Chinese system against the western ideology. One is, as Nelken argues, that particular values recognized by the legal system "may not always be widely diffused in the culture",[946] e.g. the majority of the British public support the death penalty although it has been abolished.[947] In China, it is also an open question how far the state ideology is shared and believed by the public. The other one is the gap between the law in the books and the law in action. Nelken argues that the ignorance of the sociological significance of the deviance of law and its planned outcome will lead to a solution of changes of law.[948] Changes of law might just lead to another gap between the new law and the new practice, or a new "problem" -- the object of policy oriented research.

A policy oriented comparative study seeks to "borrow" from the experience of other jurisdictions in order to improve the home system. However, the home scholars' understanding of the foreign system might not always be accurate if it is restricted by assumptions cultivated in their own culture and system. Therefore, reforms guided by such understandings cannot always promise success in healing the problems of the home system, but might lead to more confusion. This thesis is not a piece of policy oriented research, and has no ambition of significantly improving practice, nor is it a project of legal transplantation. The motivation of this comparison is to provide a more in depth understanding of China's obsession with public opinion about its justice system and of the real problems of its justice system, in light of the discussion of some widely accepted values which are/appear to be also adopted by the Chinese authorities or scholars. These values are invoked to justify some of China's particular attempts to create institutional connections between public opinion and the legal system. This study looks at their

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[946] ibid, p. 147.
[947] Mark Johnson and Conor Gearty, 'Civil liberties and the challenge of terrorism' in Alison Park *et al.* (eds), *British Social Attitudes: The 23rd Report 2006/2007* (Sage 2007) p. 150.
[948] Nelken, 'Comparative Criminal Justice', p. 148.

different inter-relations with particular legal institutions in the English system; it will also look at other jurisdictions in respect of some details when necessary. It aims to rethink China's problems through comparison, rather than provide the "general enlightenment" or "parallel descriptions" i.e. "overviews of a single system with at best only passing reference to other systems" criticised by Feeley.[949] The similarities and differences that this comparison will explore are the different justifications that are invoked for what may be functionally equivalent institutions, and the different interpretation and application of the values which appear literally the same. Explanation of causes of the findings might include extra-legal influences e.g. historical tradition, economic development, changes of beliefs and values, distribution of political power, etc.

The comparative study of this chapter is a comparison of several particular issues relevant to the subject of this thesis rather than a comparison of the whole systems. The concrete issue of this comparison is the public's involvement or public participation in the decision making process of the justice system. The phenomena to be compared are the jury trial in the English system, and the People's Assessors' system and the pilot People's Jury in several provinces in mainland China which have been discussed in Chapter 3. The relevance of this issue comes from the popular belief in the democratic values that a legitimate justice system should have in China, shared by academics and symbolised by lay participation. This belief also contributes to a theoretical support for the idea that the justice system cannot and should not be free from the influence of public opinion. When justifying the lay participation within the Chinese system, the Chinese scholars also employ their interpretations about lay participation in other legal systems with their specific concerns and assumptions to be part of the justification. However, it is doubtful to what extent an understanding of a re-constructed system by researchers could contribute to the improvement of the justice system. The first section of this chapter will analyse to what extent jury trial is justified by democratic values and what democratic values indicate in this context and compare it with the popular Chinese rhetoric of "judicial democracy", and the impact of democratic values on the legitimacy of the justice system in different contexts. This section will also look at jury trials in other jurisdictions for further evidence where needed. Through this comparison, this section will: 1) critically

[949] Malcolm M. Feeley, 'Comparative Criminal Law for Criminologists: Comparing for What Purposes?' in David Nelken (eds), *Comparing Legal Cultures* (Dartmouth 1997) p. 95.

examine the idea of "judicial democracy" and discuss varied understandings of democratic values in different contexts; 2) discuss the mixed impact of democratic values on legitimacy of different justice systems; 3) discuss the composition and representativeness of the English jury and compare it with China's PAs and pilot People's Jury, whether composition and representativeness of public participation institutions have an impact on impartiality of decision making, and public opinion's impact on their impartiality. These discussions are provided in order to support and develop the argument that the public's engagement in the justice system is not simply about the appearance of a number of ordinary people, or whether their composition can represent the community, but it is about how far citizens can challenge the state when a possible state power abuse is perceived by the community.

6.1 How Democratic Values Are Related to the Legitimacy of the Justice System

Public participation in the justice system and democratic values may include two different aspects: 1) to what extent democratic values could be used to justify public participation in the justice system; 2) what might be the impact of public participation in the justice system on democracy? This part will focus on the first aspect, but will also briefly note the second aspect if it is argued in literature as justification of public participation.

6.1.1 What Are the Democratic Values Implicated by Lay/Public Participation?

In China, the obsession on the tension between public opinion and the judicial impartiality partly derives from the idea of "judicial democracy", which requires reflection of public opinion in the administration of justice to some degree.[950] There is no explicit official definition of this concept, but it remains as an important rhetoric and a frequently mentioned political slogan. Hu Ming explains this concept to be "the implication that adjudicative power belongs to the people, adjudicative activities which

reflect public opinion to a proper degree by an independent adjudicative organ via procedure of democratic spirits".[951] Lay participation in the justice system e.g. the People's Assessors' system is acknowledged as an implication of "judicial democracy" by the senior leadership,[952] judges,[953] and scholars,[954] and, therefore, it has become a shared belief among the elites. These PAs are expected to bring public opinion and sentiment into adjudication, although it is criticised that this system fails to function as it is expected to.[955]

Lay participation in the justice system is not only expressively connected to democratic values in China but also in the West, e.g. researchers have argued that the jury is correlated to democracy and democratic values to some extent. When Vidmar concludes *World Jury Systems*, he argues that "the jury remains an intriguing institution that grew out of ideas associated with democracy and legal justice".[956] The jury is perceived as "injecting democratic values into the legal process, as a vesicle of common wisdom, as a guard against judicial power, as an institution for educating people about the law and as an institution that brings legitimacy to the law".[957] As democracy is a very loose concept including various types, this section will discuss democratic values in term of participatory democracy, which is most relevant to jury. The jury as participatory democracy is also acknowledged by other scholars, e.g. Albert W. Dzur refers to juries as

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[950] Hu Ming, 'The Definition and Theoretical Ground of Judicial Democracy – From the Perspective of Criminal Justice' (司法民主的概念与理论支点——以刑事司法为主要视角), *Procedural Law Study Series*, Vol. 11, 2006, p. 186.
[951] ibid, p. 190.
[952] Tian Yu, 'Luo Gan: Constructing the People's Assessors' System with Chinese Characteristics and Promoting Judicial Democracy' (罗干: 建设中国特色人民陪审员制度 促进司法民主) (*Xinhua*, September 3rd 2007) <http://news.xinhuanet.com/newscenter/2007-09/03/content_6656451.htm> accessed August 10th 2013.
[953] Wang Shengjun, 'The Annual Report on the SPC's Work 2012' (最高人民法院工作报告) (*Gov.cn*, March 19th 2012) <http://www.gov.cn/test/2008-03/21/content_925627.htm> accessed August 10th 2013; Luo Shuzhen and Mei Xianming, 'The People's Assessors: Leave "Sitting but not Adjudicating", Improve Judicial Democracy' (人民陪审员：告别"陪而不审"，扩大司法民主), *People's Court Daily*, September 18th 2012, p. 001.
[954] Hu, 'Theoretical Ground of Judicial Democracy', p. 181-215.
[955] Li lifeng, 'Introducing Public Opinion to Adjudication – Reform and Improvement of the People's Assessors' System' (民意的司法拟制——论我国刑事审判中人民陪审制度的改革与完善), *Contemporary Law Review*, No. 5, 2013, p. 120.
[956] Neil Vidmar, 'The Jury Else in the World' in Neil Vidmar (eds), *World Jury Systems* (Oxford University Press 2000) p. 447.
[957] Neil Vidmar, 'A Historical and Comparative Perspective on the Common Law Jury' in Neil Vidmar (eds), *World Jury Systems* (Oxford University Press 2000) p. 2.

"participatory democratic institutions";[958] Blake argues that jury trial is "participatory democracy, direct involvement in the decision making institutions of the state, rather than the representative democracy which forms the basis of parliamentary or local government".[959]

Dzur argues that "government institutions are ineffective, unstable, and vulnerable to bias without citizen participation."[960] However, nuances of the jury – one of the most significant forms of citizen participation in the justice system -- could make a big difference to its impact, e.g. whether citizens fully understand the meaning of this duty and are willing to participate, whether they have the power to make their decision independently, free from the fear of retaliation by the state etc. Democratic values cannot be implicated within the justice system without any conditions. Writing in the 1960s, Jearey argued that in any jury there might be jurors who refuse to agree with other jurors because of "stupidity, bias, corruption or, more frequently, plain obstinacy", and it was more likely to happen in a country "where the jurors are comparatively poor and ignorant", when he explained the problems of trial by jury in several British African territories.[961]

Another example is the early English jury. The jury has been developed in England over centuries and inherited by many common law countries and enshrined in e.g. the US's constitution because of citizens' distrust of the state power. However, the early English jury was not an independent fact-finder and was not free from fear or pressure when carrying out their duty. As Lloyd-Bostock and Thomas note, early jurors experienced physical coercion e.g. being locked up without heating, food etc. until they return a guilty verdict, and the notorious Star Chamber punished jurors who refused to convict.[962] The English jury did not become an independent powerful fact-finder until the Lord Chief Justice's landmark decision on *Bushell's case*, which arose from a previous case where two Quakers were charged of unlawful assembly and the jurors who refused to

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[958] Albert W. Dzur, *Punishment, Participatory Democracy, and the Jury* (Oxford University Press 2012) p. 41.
[959] Nicholas Blake, 'The Case for the Jury' in Mark Findlay and Peter Duff (eds), *The Jury Under Attack* (*Butterworths* 1988) p. 142.
[960] Dzur, *Participatory Democracy*, p. 45.
[961] J. H. Jearey, 'Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories: I', *Journal of African Law*, Vol. 4, Iss. 3, 1960, p. 135.
[962] Sally Lloyd-Bostock and Cheryl Thomas, 'The Continuing Decline of the English Jury' in Neil Vidmar (eds), *World Jury Systems* (Oxford University Press 2000) p. 55.

convict and pay a fine went to jail instead of the defendants; as it has established that the jury should not be punished if they reach a verdict according to conscience.[963] With impunity, the English jury may acquit even when the law and evidence indicate the defendant's guilt in a number of cases e.g. a jury acquitted Clive Ponting who was accused of leaking official secrets, and therefore Lloyd-Bostock and Thomas argue that "jury nullification" – "the right of juries to decide according to conscience and refuse to apply the law" is central to the democratic values of jury.[964]

Blake argues that the jury is not only important in the cases against freedom of expression but also important to restrict the police powers, e.g. acquittals of charges of riot and the like against miners in 1985; and sometimes the prosecution abandoned cases rather than leave them to jury acquittal.[965] This argument might bring some insight into China's situation. Abuse of police power is a serious problem affecting both fairness and public confidence in China. Some cases where police power abuse is involved did raise intense public opinion and concerns, e.g. the "hide and seek" case discussed in Chapter 3 and Yang Jia's murder trial discussed in Chapter 4. Scandals of torture for evidence or confession is acknowledged and studied by many scholars,[966] and extensively reported in the news coverage of some high profile cases e.g. Zhao Zuohai's case.[967] Chinese judges, like Japanese judges who will be discussed later, often rubber stamp the prosecution's charges, which are mainly supported by the evidence from police investigation even if some is obtained through torture, as discussed in Chapter 3. Abuse of police power has raised serious concerns about miscarriages of justice and its infringement of the rule of law, e.g. the police campaign -- "cracking-down mafia crime" in Chongqing is criticised as "the police cracking-down crimes like a mafia". How to restrict police power and test their evidence by an independent mind is thereby a practical concern (although this is only one of the many conditions e.g. effective defence lawyers which could contribute to restricting police power). However, whether China can establish a jury as independent as

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[963] ibid.
[964] ibid, p. 56, 87-89.
[965] Blake, 'The Case for the Jury', p. 141-142.
[966] Wei Wu and Tom Vander Beken, 'Police Torture in China and its Causes: A Review of Literature', *Australian & New Zealand Journal of Criminology*, Vol. 43, No. 3, 2010, p. 557-579.
[967] Kong Pu, 'Five Police Officers Received Penalty for Torturing Zhao Zuohai' (5 名警察逼供赵作海获刑), *Beijing Times*, August 25th 2012, p. A01; Shi Yu, 'Zhao Zuohai Tells the Details of Torture' (赵作海讲述被刑讯逼供细节), *Southern Metropolis Daily*, May 12th 2010, p. AA03.

the English jury is uncertain, as even the Chinese judiciary are not independent, which is established in Chapter 3. If the jury just rubber-stamps the prosecution's charges like Chinese judges do, it is unlikely to make a difference, as Blake argues that the unpredictability of jury's verdict is the guarantee of its independence.[968]

This thesis argues that the essence of democratic values within the justice system is to restrict the state power by genuine public engagement and entitle the public to challenge any possible abuse of state power; otherwise, any institutions rhetorically bearing democratic values would be no more than symbolic, especially in an authoritarian state. The establishment of a jury or any jury-like democratic institutions in the justice system thereby is not only a technical legal issue as to who is the best fact-finder or decision maker. Restriction on state power is one of the reasons why the details of the jury system vary from different common law jurisdictions but they are still regarded as a democratic institution. In the cases which are eligible for jury trials, citizens are able to challenge malicious prosecution (e.g. prosecution for the purpose to persecute outspoken citizens) or a law which is against the beliefs and values which are actually widely diffused in the community instead of what is represented by the state ideology. If there is no prospect of restricted state power, even if jury or lay assessors are established, they could not be able to be an independent fact-finder or decision maker and will not be an independent check on any abuse of power. This is a more fundamental reason for a lack of representativeness of China's PAs and its decline in practice, which has been discussed in Chapter 3.

Juries or jury-like democratic institutions are not simply the appearance of a number of ordinary persons in the court. If a system does not grant some power to the citizens, other institutions might remain to restrict these democratic institutions to function as they are supposed to. Japan's previous experience with the jury system (1928-1943) is an example. In the previous Japanese jury system, Japanese judges had power to "disregard the jury's answers, seat a new jury, and try the case *de novo*" which "allowed judges to continue to make the final decisions on guilt and innocence".[969] In China, the law requires a "full review" of cases on appeal: review both the fact-findings and legal applications of

[968] Blake, 'The Case for the Jury', p. 142.
[969] Lester W. Kiss, 'Reviving the Criminal Jury in Japan' in Neil Vidmar (eds), *World Jury Systems* (Oxford University Press 2000) p. 361-362.

the case, which is not restricted by which part the defendant appeals against or the prosecution protests against. If this principle remains with the establishment of jury system, Chinese judges will have the chance and power to reverse the jury's verdict at least theoretically. What is likely to happen subsequently might be like Japan's previous experience: defendants, voluntarily or at the suggestion of attorneys, might waive their right to jury trial "as a way of expressing piety to the authority of the judge in hopes of leniency in sentencing".[970]

It is also possible for the state to restrict what kind of cases that are eligible for jury trials and exclude political dissidents etc. who might challenge the political stability via trial by jury. In China, sensitive cases usually are not tried by panels where PAs sit or the pilot People's Jury, as discussed in Chapter 3. Japan's previous law on jury trials is another example, which makes "criminal defendants who adhered to communist and socialist ideologies" ineligible for trial by jury.[971] Even if jury trial is accessible for defendants in political sensitive cases, it is not impossible for an authoritarian state to manipulate jury selection and summon a "safe" puppet jury, which will not challenge their authority. In Chapter 3, it is discussed that the selection of the pilot People's Jury is not always random, and jurors could be deputies to the local People's Congress, members of the local committee of the CPPCC (*zhengxie weiyuan*) etc. who are also part of the state bureaucracy. Under such circumstances, before the prospect of changes of power distributions is seen, it is unlikely that the PAs or the pilot People's Jury can bring democratic values to real life in China, at least not in the cases which most need democratic challenge to the state, although they might be propagandized for a better image of legitimacy of the justice system.

After what counts as democratic values of public participation in the justice system is established, a question arises: are they intrinsic to a legitimate justice system? Is citizen's participation in the justice system a must-have? The next section will discuss this question by breaking it down into two parts: 1) discussion of arguments on democratic justice by comparing it with expert justice and examine how it is connected to the legitimacy of the justice system with notes on the negative impact of democratic justice; 2) argue that democratic justice's correlation to the legitimacy of the justice system is not

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[970] ibid, p. 362.
[971] ibid, p. 361.

isolated from its cultural context by comparison of different cultural perspectives to democratic justice.

6.1.2 Are Democratic Values Intrinsic or Indispensible to a Legitimate Justice System?

Socrates' trial and his death with his open critique on democratic institutions and justice leave a shadow over the lay participation in criminal justice. Nevertheless, democratic institutions e.g. the jury still remain and function in the justice system of a lot of jurisdictions. The jury trial has over eight centuries' history in England and has spread to a number of countries. It is established and based on the assumption that "jurors provide useful insights regarding contested facts and inject community values of equity and fairness into their decisions" and also "create a sense of legitimacy about the legal process".[972] There is popular support for jury trials in England and other jurisdictions indeed. For example, the *British Social Attitudes Survey 2005* finds that 88% of the British public perceive "trial by jury if charged with serious crime" is very important.[973] The right to trial by jury was rated as more important to democracy than any other rights given in the survey questions e.g. the right to protest against the government.[974] There was very little variation in support of jury trials despite different political affiliations.[975] Juries have received more public confidence (80%) than any other criminal justice institutions except the police (81%). A majority of the British public perceive that juries can reflect their views and values better than judges and magistrates, and have expressed their preference for a jury rather than a judge and two magistrates or a judge alone to decide their guilt or innocence if they become the defendant in court.[976] Over 80% of respondents believe a jury will return a correct verdict and they are "more likely to get fairer trials if tried by jury than judge only".[977] New Zealand also shows consistent public confidence in juries.[978]

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[972] Vidmar, 'Historical and Comparative', p. 19.
[973] Johnson and Gearty, 'Civil liberties', p. 144.
[974] ibid.
[975] Julian V Roberts and Mike Hough, *Public Opinion and the Jury: an International Literature Review* (Ministry of Justice Research Series 1/09, 2009) p. 13.
[976] Bar Council and Law Society, *Views on Trial by Jury: the British Public Takes the Stand (dca, January 2002) <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/criminal/auldcom/lorg/14.htm#03> accessed June 25th 2013.*
[977] ibid.
[978] Roberts and Hough, *Public Opinion and the Jury*, p. 18-19.

However, Lloyd-Bostock and Thomas note that "it is ironic that the English jury, which has served as a model for other countries, is in a state of continuing decline just as jury trial is being revived in a number of countries".[979] A criminal jury is used less often – about 1% in most countries, and even in the US the rate is about 8%.[980] A jury trial is only used in a very small percentage of criminal cases. The *Supreme Court Act 1981* also restricts that only four kinds of civil cases may be tried by jury. A number of proposals have been made to restrict the actual use of juries in England and Wales.[981] Most people in England are unaware of the proposals to restrict the right to jury trial, although most respondents of a survey opposed such proposals once they were briefly informed.[982] Similarly, Australia and Canada also showed strong resistance to restrictions or the abolition of jury trials.[983] Restriction to the right to jury is a highly controversial issue. In contrast, jury trial has been revived or introduced in some civil law jurisdictions e.g. Spain and Russia. Questions arise to what extent the jury is still related to the legitimacy of this justice system; and whether democratic values always have a positive impact on the legitimacy of the justice system.

The democratic impact on the criminal justice system might lead to a less legitimate profile and the US is an example. Whitman argues that the US criminal justice system is more retributive than in continental Europe, as its democratic politics or "demagogic politics" has more impact on criminal justice than it does in continental Europe.[984] However, Dzur argues that such critiques on democratic justice could be misleading by taking the *Apology* as an example. Dzur stands with Aristophanes (who satirised Socrates in *Clouds* and juries in *The Wasps*) acknowledging that experts are no more free from undue influences than jurors are; however, he further argues that "it is the *clouded* and sealed-off nature of technocracy that causes problems" where "unjust expert decisions... will be less widely known and less able to be corrected".[985]

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[979] Sally Lloyd-Bostock and Cheryl Thomas, 'Decline of the "Little Parliament": Juries and Jury Reform in England and Wales', *Law and Contemporary Problems*, Vol. 62, No. 2, 1999, p. 40.
[980] Vidmar, 'Historical and Comparative', p. 48.
[981] Roberts and Hough, *Public Opinion and the Jury*, p. 7.
[982] Bar Council and Law Society, *Views on Trial by Jury.*
[983] Roberts and Hough, *Public Opinion and the Jury*, p. 23.
[984] James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford University Press 2005) p. 199.
[985] Dzur, *Participatory Democracy*, p. 154.

However, whether public participation in the decision making can contribute to a more open decision making process than technocracy is a complex issue. Japan's current mixed jury system might be a complex example of such, where six lay persons (*saiban-in*) and three professional judges constitute a jury, which decides both culpability and sentencing, and only requires a majority vote.[986] This reform is out of the concern that public confidence in the criminal justice system declined as a result of a perceived homogenous judiciary who are out of touch with the public and lack of common sense and some high profile miscarriages of justice where the innocent were sent to prison.[987] In order to stem any possible public punitiveness, professional judges will sit with jurors, and they will be "explaining to lay jurors their logic and methodology and guarantee that, at a minimum, jurors consider the factors believed by the court to be important for making just decisions".[988] However, the concerns about the degree of jurors' active involvement in deliberation still exist because of the hierarchical nature of Japanese society, the culture which highly values harmony, and the group identity.[989] The jury's composition could also affect the degree of the lay persons' involvement, e.g. "better-educated individuals would have more confidence to express their position in deliberation with a judge".[990] Dzur's argument and Japan's experience might bring some insight into China's current situation.

In recent years in China, the professionalization of the judiciary has become a general trend. However, the professionalization of the judiciary is not free from concerns about whether a professionalized judiciary will be "out of the touch of the society and the people", as is openly expressed by the former president of the SPC.[991] It is therefore not surprising to see a revival of the practice of the PAs as a significant symbolic of democratic values within China's justice system, with the CPC's hope for its blessings on the legitimacy of and public confidence in the justice system. However, as established in Chapter 3, the PAs practically often just sit but are not actively involved in the decision

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986 Robert M. Bloom, 'Jury Trials in Japan' (2005) Boston College Law School Faculty Papers <http://lawdigitalcommons.bc.edu/lsfp/41/> accessed May 16th 2014, p. 3-4, 6.
987 Ingram Weber, 'The New Japanese Jury System: Empowering the Public, Preserving Continental Justice', *East Asia Law Review*, Vol. 4, Iss. 1, 2009, p. 151-152, 149.
988 ibid, p. 171-172.
989 Bloom, 'Jury Trials in Japan', p. 25-26.
990 ibid, p. 34.
991 'Wang Shengjun: The Justice System should not be Mystified' (王胜俊：司法不要搞神秘化) (*People.com*, August 28th 2008) <http://politics.people.com.cn/GB/7738695.html> accessed May 16th 2014.

making, and they thereby have limited impact on the actual impartiality and fairness of the system. The professionalized Chinese judiciary in the developed areas are criticised by Xin He as being bureaucratic, as discussed in Chapter 2. However, the real problem, this thesis argues, is that the Chinese judiciary is professionalized in a justice system which lacks openness and transparency and is not always open to public scrutiny, rather than simply a difficult choice between professionalization and democratization. This problem is similar to the "clouded and sealed-off technocracy" criticised by Dzur. With regard to unfairness caused, victims of miscarriages of justice (here this thesis uses the term to refer to any significant errors which affect fairness, e.g. the innocent are wrongly convicted, the real guilty party goes free or is convicted but gets an unduly lenient sentence) would still cry out that the unjust decisions need to be corrected. If such cases somehow become of great public concern in an authoritarian state which is very sensitive to public disaffection, the authority might "suggest" that the judiciary corrects such decision, provided they do not perceive such correction would jeopardize its governing. In some high profile cases, the authority could be willing to respond to popular pressure. As Hague and Harrop note, "responding to popular pressure on non-sensitive issues can limit dissent and enhance political stability".[992] The politically sophisticated judiciary without independence is also reluctant to cause the trouble of great public disaffection. Therefore, indirect public pressure on the judiciary, rather than the more institutionalized public participation, becomes a very occasional and temporary remedy incidental to the unfairness in a closed bureaucracy like China, although public opinion itself is also subject to strong influence from the state in China, which is established in the previous chapter.

Moreover, the concern about whether a more professionalized judiciary will be isolated from the people is not simply a tension between professionalization and democratization of the justice system. In fact, it is a tension intrinsic to the current political system. Judges are expected to be politically sound and most of them are CPC members, as established in Chapter 3. Hague and Harrop note that one of the CPC's major dilemmas is "it can only attract members by offering opportunities to acquire resources but the dubious manner in which these are obtained increases the distance between party

[992] Rod Hague and Martin Harrop, *Comparative Government and Politics An Introduction* (8th edition, Palgrave Macmillan 1982) p. 170-171.

and society".[993] The judiciary is still part of the state bureaucracy, and the patron of senior judges e.g. the president of the SPC is still a political appointment. As Hague and Harrop note that in authoritarian states, the unofficial patronage network which provides opportunities to politically sound clients and ignores their shady behaviour leads to corruption.[994] Never is there a lack of scandals of corruption etc. within the senior judiciary, e.g. the former vice president of the SPC Huang Songyou, and the recent intensely publicized and still rising scandal of several senior judges in the Higher Court of *Shanghai* that accept the service by prostitutes as bribes.[995] These scandals of the Chinese judiciary could distance them from the society. Because of this distance, created by the unavoidable corruption from the problematic source of patronage, this thesis argues that its justice system particularly needs more democratic symbols to portray itself in accordance with its image constructed by the state ideology – a judiciary of the people. Therefore, the People's Assessor system was emphasized by the state and Chinese courts are required to maintain such practice to different degrees in the recent years despite its continuous decline in practice, as discussed in Chapter 3; and Chinese judges at the primary level have to undertake some roles which might be perceived to be unprofessional by their western peers, e.g. poverty alleviation projects etc. as discussed in Chapter 3, in an attempt to maintain some appearance of connections to the community.

However, some of Dzur's arguments on the merits of democratic justice compared with technocratic justice, e.g. that democracy is better at "adjusting to circumstances, admitting mistakes, and modifying an established pattern of decision making", lack evidence in different systematic and cultural contexts, and are thereby open to challenge. This thesis argues that the extent of flexibility of decision making is determined by how much discretion is left to the decision maker by law and to what extent the culture is tolerant to/favours discretion empowered to the decision maker, rather than how democratic/technocratic the justice system is. The discussion on the impartiality/discretion of Chinese judges in its historical context in Chapter 2 is an example of a flexible technocratic justice system where the culture also favours it. In contemporary China, judges still enjoy extensive discretion in most of the routine cases

[993] ibid, p. 111.
[994] ibid, p. 101-102.

(except political sensitive or high profile cases), in order to adapt to varied and changing circumstances. Dzur's argument therefore cannot be used to explain why China still maintains a certain amount of democratic symbolism in its justice system.

Dzur argues that jurors can bring "socially situated juridical knowledge" to the court.[996] However, whether the professional judges have to rely on jurors for such knowledge is a complicated issue in China. Judges of the primary courts tend to be closer to the community than judges of the superior courts, as was shown in the BBC documentary program *Law of the Dragon* (2011) where a judge is capable of handling cases with "socially situated juridical knowledge". He is only one of many examples. However, Chinese scholars and judges perceive that China is still transforming from the "acquaintance society" to the "stranger society" and a number of regions especially many rural areas still remain as the "acquaintance society"; as a result, Chinese judges within the "acquaintance society" are more vulnerable to extra-legal influences and pressure especially channelled through *guanxi* or other various connections to the community although they have such "socially situated" knowledge,[997] as they perceive that western judges particularly the judges of common law jurisdictions isolate themselves from the public by e.g. use of jargon, complex procedures.[998] The major concern about the capacity of Chinese judges, openly expressed by many Chinese scholars and judges, is the uneven improvement of professionalization and competence, as discussed in the first part of Chapter 3. However, e.g. in England, the major public concern about the judiciary is that they are perceived to be out of touch with the community, as discussed in Chapter 2. Therefore, to what extent the demand of "socially situated juridical knowledge" can lead to the establishment of a democratic institution within the justice system, e.g. jury system, is relevant to the varied concerns in different context.

When defending democratic justice, Dzur also argues that expert justice has more risk of losing "civic dignity", as he regards "treating the defendant... as a coequal partner in a civic dialogue about the law's demands is to treat him with dignity".[999] However, this

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[995] Zhang Xuebin and Chen Lu, 'Duties of Four Judges Chen Xueming *et al.* have been Suspended for Investigation' (陈雪明等 4 人被停职接受调查), *Southern Daily*, August 5th 2013, p. A02.
[996] Dzur, *Participatory Democracy*, p. 161.
[997] Song Yuansheng, 'The Social Role and Its Transformation of the Judges in Folk Society' (乡土社会型法官的社会性角色及其转型), *Shandong Social Sciences*, No. 6, 2012, p. 137-139.
[998] ibid, p. 138-139.
[999] Dzur, *Participatory Democracy*, p. 159-160.

thesis argues that it is a cultural belief whether the public would prefer to be tried by their lay peers rather than a professional judge and whether they would think that technocratic justice would risk "civic dignity". However, Japan and Spain are two counter examples, also with very limited evidence from China.

Democratic values might not be appreciated in a culture which respects authority and discourage challenges to the authority as much as it is in a culture of democratic tradition. As a result, the system is likely to keep obstacles to any democracy-like institutions' function. Most Japanese scholars believe that the decline of their previous jury system (1928-1943) is relevant to the Japanese culture to different degrees, i.e. the Japanese society is hierarchical and its people respect authority, and therefore "the Japanese people prefer trials by 'those above the people' rather than by 'their fellows'", and "those above the people" refer to "experienced and honest judges", although nowadays lay participation is more accepted in Japanese society.[1000] This culture is similar to China. Traditionally, the Chinese people are more likely to present a dispute to a perceived authority (not necessarily a professional judge). This sentiment still remains especially in rural areas, e.g. an empirical study on the dispute resolution in a Chinese village found that the villagers still tend to appeal to different "authorities" to solve their disputes under different circumstances, e.g. the village cadre, the local government, the local court, or "able persons" who are perceived to be "very experienced", at better social and economic status, "better educated", "excel in dealing with people" and perceived to be fair by the villagers, etc.[1001] These "able persons" apparently are different from twelve men randomly selected from their peers. However, China is experiencing dramatic and uneven social changes. Therefore, further evidence on changes of cultural and political beliefs is needed to conclude whether Chinese people prefer to be tried by a more honest and fair judiciary or their fellow citizens nowadays, when they are frustrated at the performance of the current judiciary e.g. due to corruption.

In Spain (1997), a year after the re-introduction of the jury system, a survey found that over a half of the Spanish public preferred trials by professional judges to lay jurors, compared with almost a half of the Spanish public preferred to be tried before a jury; and

[1000] Kiss, 'Jury in Japan', p. 362-363, 376.

over a half of them perceived judges are more likely to reach a just decision.[1002] Thaman also notes that the acquittal of *Mikel Otegi* has drawn the Spanish public's attention to the new jury system but in a very negative way, and the Spanish public suspected that the jury returned such a verdict out of "fear of retribution" or "sympathy with the Basque Nationalist".[1003] If such suspicion is true, it suggests that the jury is not always able to represent the values and beliefs shared in the community in individual cases if they are biased or under pressure. Spain's experience also suggests that the establishment of a jury does not automatically assume public engagement in the justice system. First, the Spanish public also showed very little interest in serving on a jury.[1004] Second, as Thaman notes, prosecutors also try to avoid jury trials by downgrading charges or "reaching agreements with defendants" in minor cases, and there has been "remarkably few jury trials".[1005] If the jury system is established in a society where most people resist this duty, its operation will confront problems. On the other hand, establishment of the jury systems is not always solely motivated by the pursuit of democracy, e.g. Japanese scholars argue for a jury system out of concerns about judges' ability as fact-finders for two reasons: the first one is the "trial by dossier" where judges "simply rubber stamp" the prosecution's factual findings and legal conclusions; the second one is that Japanese judges are regarded as an elite group with "limited range of life experience" which "may negatively affect the fact finding abilities".[1006]

However, whether an inquisitorial system can accommodate the jury or whether the jury could become a better fact finder than judges in the inquisitorial system is another story. Vidmar argues that inquisitorial procedure does not accommodate jury trials as well as adversarial procedure, and argues that in the 18th century the English criminal jury functioned in a more inquisitorial than adversarial system, where judges had a "dominating role in instructing the jury not only on the law but on what the verdict should

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[1001] Ma Jinghua and Chen Yiming, 'The Trouble-shooters of Dispute Resolution in Gan Village – An Investigation of a Village in the North-eastern *Sichuan*' (柑村纠纷解决实践中的解纷主体——以川东北某村的考察为中心), *Journal of Justice*, Vol. 1, 2006, p. 174-192.
[1002] Centro de Investigaciones Sociologicas (2007), cited by Roberts and Hough, *Public Opinion and the Jury*, p. 33-34.
[1003] Stephen C. Thaman, 'Europe's New Jury System: The Cases of Spain and Russia' in Neil Vidmar (eds), *World Jury Systems* (Oxford University Press 2000) p. 350.
[1004] Centro de Investigaciones Sociologicas (2007), cited by Roberts and Hough, *Public Opinion and the Jury*, p. 32.
[1005] Thaman, 'Spain and Russia', p. 351.

be... the juries usually followed instructions".[1007] Thaman argues that trial by jury is in contradiction with the three principles assumed by inquisitorial criminal procedure: "(1) the duty of the state...to ascertain the truth, (2) the necessity of reviewability of judgments, as reflected in the requirement of providing reasons for findings of guilt or innocence, and (3) the principle of mandatory prosecution ('legality principle')"; the third principle restricts "unbridled discretion of juries" and plea-bargaining.[1008] China's justice system has a strong historical inquisitorial tradition.[1009] The contemporary Chinese justice system has also adopted the inquisitorial mode, although there are reforms of some details towards the adversarial procedure. There is no cross examination of witness, and it is also a very rare event that witnesses take the stand and give testimony at trials in China, e.g. half of the courts of a city had no witnesses take the stand at criminal trials in 2004, and in the same year, only 0.38% of criminal trials had witnesses' participation in the courts of this city.[1010] The routine practice is that each party reads out the statement of witnesses and they argue over these statements on paper. However, the principle of orality i.e. the oral examination of witnesses in court "has always been at the heart of the English trial, partly because of the dominant role played for centuries by the jury".[1011] In order to protect vulnerable and intimidated witnesses, interviews of witnesses via live links is increasingly used; although research finds that jurors may appear to prefer to give live evidence even if this does not appear to affect jury deliberation, and there are mixed views about whether video interviews, compared with conventional live testimony, would impair/improve/have the same impact on jury's ability to evaluate witnesses' testimony and their decision making.[1012] This suggests the close correlation between jury trial and witness testimony in court. Therefore, with regard to witnesses' frequent absence in Chinese courts, to what extent introducing the English jury to China can make a difference

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[1006] Kiss, 'Jury in Japan', p. 356-358.
[1007] Vidmar, 'Historical and Comparative', p. 16.
[1008] Thaman, 'Spain and Russia', p. 320-321.
[1009] Zhang Weiren, 'The Origin, Development and Characteristics of Chinese Legal Culture (Part 2)' (中国法文化的起源、发展和特点（下）) *Peking University Law Journal*, Vol. 23, No. 1, 2011, p. 12.
[1010] Zuo Weimin and Ma Jinghua, 'The Rate of Witnesses Appearing in Criminal Trials: A Theoretical Elaboration based on Empirical Research' (刑事证人出庭率：一种基于实证研究的理论阐述), *China Legal Science*, No. 6, 2005, p. 165-166.
[1011] Michael Zander, *Cases and Materials on the English Legal System* (10th edn, Cambridge University Press 2007) p. 415.
[1012] Graham Davies, 'The Impact of Television on the Presentation and Reception of Children's Testimony', *International Journal of Law and Psychiatry*, Vol. 22, Iss. 3–4, 1999, p. 241–256.

to fact finding in criminal trials is uncertain. Moreover, this thesis argues that the inquisitorial procedure and the system where the state (judges and public prosecutors) is responsible for establishing the truth and deliver justice and maintain their authority through excising such duty, which is established in China, is fundamentally conflicting with institutionalized public engagement in the decision making of individual cases. It is also in contradiction with such a system to introduce public opinion through any kind of intuition and decide cases according to these "public opinions".

The impact of democratic institutions within the justice system is mixed. Apart from the arguments on the positive side for the use of the jury which are discussed above, jury trials also might have a positive impact on the political democratic participation. Gastil *et al.* have found that "jurors who served on criminal trials that reached verdicts became more likely to vote in subsequent elections".[1013] They thereby argue that "the jury system may serve as an institutionalized school for political participation".[1014] On the other hand, the jury is not a perfect institution and does not always indicate fairness. There are various kinds of jury misconduct, e.g. in the UK, one juror was listening to an iPod when the defendant was giving evidence; others have carried out their own research about the case, brought extraneous materials into the jury room, etc.[1015] which will affect the perceived legitimacy of the justice system. Similar jury misconduct are also found in other jurisdictions, e.g. in Australia.[1016] Therefore, the jury's impact on the legitimacy of the justice system is a complex picture, as Abramson notes at the very beginning of *We, the Jury*:

> trial by jury is about the best of democracy and about the worst of democracy. Jurors in Athens sentenced Socrates to death for religious crimes against the state, but in England jurors went to prison themselves rather than convict the Quaker William Penn. Juries convicted women as witches in Salem, but they resisted witch hunts for communists in Washington. Juries in the American South freed vigilantes who lynched African-Americans, but in the North they

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[1013] John Gastil, E. Pierre Deess and Phil Weiser, 'Civic Awakening in the Jury Room: A Test of the Connection between Jury Deliberation and Political Participation', *The Journal of Politics*, Vol. 64, No. 2, 2002, p. 593.
[1014] ibid, p. 594.
[1015] Sally Broadbridge, 'Recent Developments Concerning Juries', Standard notes SN02876, (*Parliament UK*, May 19th 2009) <http://www.parliament.uk/briefing-papers/SN02876> accessed August 6th 2013, p. 13-14.
[1016] Rowena Johns, *Trial by Jury: Recent Developments* (New South Wales Parliamentary Library Briefing Paper No. 4/05, 2005) p. 28-40.

> sheltered fugitive slaves and the abolitionists who helped them escape…In short, the drama of trial by jury casts ordinary citizens as villains one day, heroes the next, as they struggle to deal justly with the liberties and properties – sometimes even the lives – of their fellow men and women.[1017]

The institution of the PAs -- a democratic symbol -- also leaves a very mixed memory for the Chinese. It was provided in the *Constitution 1954* (the first of the four constitutions of the PRC), and became associated with mass political campaigns for class struggle and harassing individual citizens.[1018] The People's Assessors' system is missing from the current constitution, and is only provided as optional in the current civil procedure law, the criminal procedure law etc., which is criticised by Chinese judges and scholars as one of the reasons for the decline of this system in practice.[1019] The SPC has been taking efforts to raise the inferior courts' awareness of this system and requires practice of this system and further improvement. [1020] In contrast, Germany has a different attitude towards its mixed court system and lay assessors. It is not provided in the German Constitution (the *Grundgesetz*), neither does the Supreme Court of Germany demand it.[1021] Professional judges could successfully use their authority to suppress lay assessors' influence during deliberation, and regard it as "tiresome", although the German law provides lay assessors a theoretically influential role to outvote the professional judges when achieving decisions.[1022] Support for lay participation is rarely found in serious academic work and it is not perceived as "an important feature of democracy or as an essential element for the justification of criminal trials", although support is occasionally found in political speeches.[1023]

When Hörnle looks at the historical background of lay participation in 19th century Germany, her arguments might bring some insight into understanding the decline of lay

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[1017] Jeffery Abramson, *We, the Jury The Jury System and the Ideal of Democracy* (BasicBooks 1994) p. 1.
[1018] Guo Jingbo, 'A Survey on the Current Situation of the People's Assessors' System and Suggestions on Potential Reforms' (对人民陪审员制度现状的调查与改革构想) (*Chinacourt.org*, September 5th 2003) <http://old.chinacourt.org/public/detail.php?id=79036&k_title=&k_content=&k_author=> accessed August 27th 2013.
[1019] ibid.
[1020] SPC, *Several Suggestions on Reinforcing and Improving the Work of the People's Assessors by the SPC* (最高人民法院关于进一步加强和推进人民陪审工作的若干意见), Document Number [2010] No. 24 (法发〔2010〕24 号), June 29th 2010.
[1021] Tatjana Hörnle, 'Democratic Accountability and Lay Participation in Criminal Trials' in Antony Duff *et al.* (eds), The Trial on Trial Volume 2 Judgment and Calling to Account (Hart 2006) p. 136.
[1022] ibid.

participation in some other jurisdictions e.g. England. Hörnle argued that lay participation provided protection against "arbitrariness and despotism exercised by sovereigns through judges who were dependent on them"; however, after judicial independence was widely established and the "general distrust of professional judges based on deficiencies of the state organisation is no longer warranted", the historical ground for restricting judges through lay participation no longer exists.[1024] Lay participation is arguably not the only way to implement democratic values, e.g. elected judges or judges taking account of the perceived public opinion in individual cases, which are criticised by Hörnle as they are at the price of judicial independence.[1025]

To what extent democratic values are important to a particular justice system depends on their own citizens' beliefs and preferences, and the varied understanding about and attitudes towards democratic values, which are also subject to changes and influences from other cultures. It is difficult to find a one-size-fit-all answer. This thesis certainly disagrees with the idea that democratic values are universal values and any one country should follow another particular country's example. Even within the cultures and systems where democratic values are widely shared and appreciated, it could be a controversial issue, e.g. whether jury is representative enough to be regarded as a democratic institution or even whether its composition matters. The next section will discuss composition and representativeness of jury predominantly in the English jury context and compare it with relevant arguments on China and other jurisdictions. An idea behind the further discussion (not the central argument) is: implicit and variable principles e.g. democracy are important for explaining why a system is the way it is, however, in practice it is also about details.

6.2 Composition and Representativeness of the Jury and Jury Impartiality

If a jury trial is recognized as a democratic institution, the composition and representativeness of the jury becomes an important issue of its legitimacy, or: what jury is accounted to be a legitimate decision-making agency. Also, Hörnle argues that the

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[1023] ibid, p. 137.
[1024] ibid, p. 138 – 139.

participation of a small number of people is an instance of representative democracy, where the issue of representativeness arises.[1026] Should "his equals" be a representative group, a randomly selected group, or a carefully selected but impartial and independent group? Thomas and Balmer argue that these qualities are not always consistent with one another, and what supports England's jury policy is "a randomly selected jury is most likely to be representative and a representative jury is most likely to be impartial".[1027]

However, because of restrictions on eligibility, the early English jury had a strong elitist composition, which was still true in the 19th century. Tocqueville notes this when he is comparing the English jury with the American jury:

> In England the jury is selected from the aristocratic portion of the nation; the aristocracy makes the laws, applies the laws, and punishes infractions of the laws; everything is established upon a consistent footing, and England may with truth be said to constitute an aristocratic republic. In the United States the same system is applied to the whole people. Every American citizen is both an eligible and legally qualified voter. The jury system as it is understood in America appears to me to be as direct and extreme a consequence of the sovereignty of the people as universal suffrage.[1028]

Tocqueville might be mistaken, in that only the Grand Jury was aristocratic and petty jurors were men with a certain amount of property but not aristocrats. However, it is true that the English jury is not always open the entire general public. Jury eligibility was not made independent from ownership of property and rateable values in England until 1972 and the *Juries Act 1974* substantially granted eligibility to most ordinary people; however, Blake notes that such democratic achievements did not please everyone, i.e. judges, policemen, and lawyers complained that jurors were "too stupid, or too irresponsible, too easily bribed or intimidated, too much of a security risk, too expensive and the like".[1029]

Although jury service is open to the general public, under-representation of racial and ethnic minorities is still one of the often mentioned concerns in research, e.g. concerns about the representation on the jury of the ethnic minority groups where the defendant and

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[1025] ibid, p. 143.
[1026] ibid, p. 142.
[1027] Cheryl Thomas and Nigel Balmer, *Diversity and Fairness in the Jury System* (Ministry of Justice Research Series 2/07, 2007) p. 5-6.
[1028] Alexis de Tocqueville, *Democracy in America* (Henry Reeve tr, Saunders and Otley 1835) p. 193-194.
[1029] Blake, 'The Case for the Jury', p. 142-143.

victim are from.[1030] Some studies find that jurors are not representative of the community in England and Wales and similar problems have been identified in some other common law jurisdictions, e.g. "under-representation of women and ethnic minorities".[1031] This suggests that random selection cannot always ensure a representative jury. There are also concerns that measures taken to construct a more represented jury might erode the principle of random selection.[1032] However, Thomas and Balmer find contradictory evidence that the computerised random selection from the electoral lists "reaches BME (black and minority ethnic) groups in remarkable consistency to BME representation in the local population for virtually all Crown Courts".[1033] They further explained that "the overwhelming majority of Crown Courts in England and Wales are Low Ethnicity Courts" and the population dynamics of the juror catchment areas can significantly reduce the likelihood of BME serving on juries.[1034] Apart from racial and ethnic element, social class also has an impact on under-representation or over-representation of particular social groups. Fukurai find out that "jurors' social class positions measured by their occupational prestige, income, and managerial authority at the work place exert greater influence than race on explaining disproportionate jury underrepresentation", e.g. African Americans and Hispanics are generally under-represented on jury panels in the US, however, African Americans and Hispanic prospective jurors with higher incomes and jobs of greater prestige are systematically overrepresented on jury panels.[1035]

However, interference in the composition of the lay decision makers does not necessarily return a more representative jury or lay panel. For example, Germany has a mixed court system i.e. professional judges and lay assessors sit on a panel. The nomination and selection process could be influenced by political parties and is less random than the Anglo-American jury system, as Kiss observed, lay assessors "often have educational and social backgrounds more similar to professional judges", although the system is aimed at "to be representative of 'all groups in the population'".[1036] China is also

[1030] Thomas and Balmer, *Diversity and Fairness*, p. 10.
[1031] Lloyd-Bostock and Thomas, 'Little Parliament', p. 21.
[1032] ibid, p. 25.
[1033] Thomas and Balmer, *Diversity and Fairness*, p. 77.
[1034] ibid, p. 77-78.
[1035] Hiroshi Fukurai, 'Race, Social Class, and Jury Participation: New Dimensions for Evaluating Discrimination in Jury Service and Jury Selection', *Journal of Criminal Justice*, Vol. 24, Iss. 1, 1996, p. 85, 81.
[1036] Kiss, 'Jury in Japan', p. 365-366.

a counter example. It has been established in Chapter 3 that the PAs are not representative of the local population in mainland China, and the pilot People's Juries also have problems of representativeness in certain kinds of cases. This problem sometimes comes from PAs or jurors of particular background that are specially selected rather than picked randomly in sensitive cases, in an attempt to secure a particular verdict, as established in Chapter 3. Interference with the random selection might leave the parties or anyone else whose interest is at stake an opportunity to construct a jury or a panel which is favourable to them. Impartiality and justice thereby will be at risk. Also, the arrangement of fixed lay assessors or jurors rather than random selection might be in contradiction with the spirit of lay justice. As discussed in Chapter 3, Chinese scholars have criticised that some courts summon the same PAs more frequently who as a result become quasi-judges. A similar phenomenon is also criticised in England, e.g. in the case *R v. Salt*, the usher of the court asked his son to sit on the jury when there were not enough jurors, while his son had done so on five previous occasions; the defendant appealed against the verdict on the ground that the conviction is not safe due to the involvement of this juror. The Court of Appeal ruled that an usher's son who regularly appeared on a jury could come within the spirit of disqualification of staff within the administration of justice in the Juries Act 1974, and quashed the conviction as unsafe, although it also acknowledged that random selection of jurors is not provided for by any rules of law.[1037]

However, it is wrong to conclude that only manipulation of the selection of PAs or jurors is responsible for the problem of representativeness of China's PAs or the pilot jury. There are similarities that it shares with England e.g. personal circumstances and commitment. In China, as discussed in Chapter 3, the retired and unemployed are more motivated to sit as the PAs in several courts. For example, in England, uncertainty of the length of the trial leading to uncertain time of absence from jobs increases the reluctance of the employers towards jury service.[1038] Some summoned potential jurors are also excused for child care and medical reasons.[1039] In England and Wales, people of the lowest household income are less likely than people of the highest household income to

[1037] *R. v Salt* (Frederick Arthur) [1996] Crim. L.R. 517.
[1038] Penny Darbyshire, Andy Maughan and Angus Steward, *What Can the English Legal System Learn from Jury Research Published up to 2001?* (Kingston University Occasional Paper Series 49, 2002) p. 5.
[1039] Thomas and Balmer, *Diversity and Fairness*, p. 103 -104.

serve on jury service if summoned.[1040] The major reason for the non-return of jury summonses is high residential mobility rather than the unwillingness of ethnic minorities to serve on juries in England and Wales.[1041] This suggests that practical concerns can powerfully mould the operation of legal institutions and might lead to a gap between the desired effect and the real effect of the public participation in the justice system.

However, does jury diversity have an impact on how juries reach a verdict? Does jury composition affect jury impartiality? It is more difficult to find evidence for any explicit answer in England, as the jury's deliberations are completely confidential and the *Contempt of Court Act 1981* makes it a criminal offence to breach it.[1042] With limited evidence, Thomas finds that "the verdicts of all-white juries did not discriminate against BME defendants".[1043] However, ethnicity could affect juror's votes. Juries are more likely to reach a verdict if only white defendants and white victims are involved in Nottingham where there is a more diverse local community, compared with Winchester.[1044] Interestingly, research finds that "white jurors were most likely to vote to convict a defendant when the victim was Black but the defendant was not Black"; however, it also admits the evidence is not conclusive to provide answers to "whether all white juries discriminate against defendants based on their ethnicity "and whether "white jurors on all-white juries vote differently than the white jurors on racially mixed juries".[1045] In another study, Thomas finds that "the only difference between white jurors serving on racially mixed and on all-white juries was that White jurors on racially mixed juries had lower conviction rates overall".[1046] "[W]hite jurors on all-white juries in a diverse community appeared particularly sensitive to the plight of a BME victim allegedly assaulted by a White defendant", however, in racially motivated crime cases, the acquittal likelihood of a white defendant is not higher by all-white juries than racially mixed juries.[1047] Generally, juries' verdicts can be expected to be fair, as "juries appear to try

[1040] ibid, p. 117.
[1041] ibid, p. 194-195.
[1042] Section 8, *Contempt of Court Act 1981*.
[1043] Cheryl Thomas, *Are Juries Fair?* (Ministry of Justice Research Series 1/10, 2010) p. 16.
[1044] ibid.
[1045] Thomas and Balmer, *Diversity and Fairness*, p. 189-190.
[1046] Thomas, *Are Juries Fair*, p. 20.
[1047] ibid, p. 20, 26.

cases on the evidence and law" and "jury conviction rates show only small differences based on defendant ethnicity".[1048]

Some scholars argue that composition is irrelevant to jury impartiality with different reasons. For example, Thomas and Blamer argue that influence of an individual juror's personal background on their personal perceptions is different from the influence of jury composition on its verdict, as the jury's verdict rather than individual juror's perceptions determines in criminal trials.[1049] Vidmar, when explaining the abolition of the Jury *de medietate linguae* (which allowed the fate of foreign defendants to be decided by a jury consisting of half members from the defendant's community) in the *Naturalization Act of 1870* in England, argues that "the universal opportunity for jury service randomizes prejudices and causes them to be cancelled out, thereby eliminating the need for juror vetting".[1050] Vidmar also argues that individual biases will be eliminated by judges' instructions and jury deliberation, or outvoted in majority verdict jurisdictions.[1051] Abramson gives a further critique on the idea of a representative jury. Abramson distinguishes two different ideals for jury democracy: the "deliberative ideal" (obtaining views from different people including the minority and "inspire jurors to put aside narrow group allegiances" to promote discussion on issues and examination of the facts) and the "group-representation" ideal (having jurors from minorities to represent the values/biases and interest of these groups) of jury.[1052] Abramson argues that over-emphasizing the "group-representation ideal" aggravates the notion that "jurors are there to be allegiant advocates for their own kind" and "the key to jury verdicts becomes whom the jurors are, not what the evidence shows".[1053]

With regard to the idea that a jury represents the community, this thesis argues that what they actually represent are the values and beliefs shared within the community rather than any community member's or group's opinion on a particular case. A jury's verdict is supposed to be under the consideration of evidence. Even if a jury's verdict is clearly contradictory to the law and evidence, it might be justified if it is in accordance with their conscience rather than any kind of perceived public consensus or opinion.

[1048] ibid, p. 31, 24.
[1049] Thomas and Balmer, *Diversity and Fairness*, p. 16.
[1050] Vidmar, 'Historical and Comparative', p. 25.
[1051] ibid, p. 33.
[1052] Abramson, *We, the Jury*, p. 245.

Jury impartiality is a complex issue and jury composition's arguable influence is not the only cause. Jury tampering also affects its impartiality. It is hard to conclude that the jury must always be more impartial than a judge or the other way around. As Howard argues that "there is no reason to suppose that a more or less random selection of ordinary people is going to have any less impressive an array of prejudices than a judge".[1054] The *Criminal Justice Act 2003* allows trial without a jury in cases of jury tampering and serious or complex fraud.[1055] Jurors might be bribed or intimidated, e.g. in a cigarette smuggling case in Northern Ireland, a juror reported two partly-masked men came to his home and tried to bribe him for case information, which caused the judge's concern about a "real and present danger" of jury tampering, and the retrial was heard by a judge alone.[1056] The case of the Heathrow robbery has become the first case without jury sitting in the crown court in England, as the jury was discharged as they were unable to reach a verdict in the second trial and the jury was discharged in the third trial because of risk of jury tampering.[1057]

Jury impartiality is especially a concern in high profile cases, i.e. concerns that jurors might be influenced by media coverage.[1058] Vidmar argues that "conformity prejudice arises when the case is of significant interest to the community" and jurors might reach a verdict by their perceived community consensus under pressure or influence rather than a verdict based on evidence.[1059] This concern is not groundless, as several juries had to be discharged because of jurors' inappropriate use of the internet, e.g. the jury in the case against Dale Patterson in Newcastle Crown Court and the jury in the child cruelty case against Jasmin Schmidt at the Old Bailey,[1060] although only less than 1% of juries have to be discharged before reaching a verdict.[1061] Judge Paget commented that it

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[1053] ibid, p. 245-246.
[1054] C Howard, '"weak link" in Justice Chain', Adelaide Advertiser, August 2nd 1985; cited by Richard W Harding, 'Jury Performance in Complex Cases' in Mark Findlay and Peter Duff (eds), *The Jury under Attack* (Butterworths 1988) p. 75.
[1055] Part 7, *Criminal Justice Act 2003*.
[1056] 'Jury Bribe Bid Sees Trial Ruling' (*BBC News*, October 16th 2007) <http://news.bbc.co.uk/1/hi/northern_ireland/7047531.stm> accessed June 27th 2013.
[1057] 'Trial without Jury: Heathrow Robbery Timeline', *The Telegraph*, March 31st 2010; 'Four Jailed for £1.75m Heathrow Robbery', *The Guardian*, March 31st 2010.
[1058] Thomas, *Are Juries Fair*, p. 5.
[1059] Vidmar, 'Historical and Comparative', p. 33.
[1060] Robert Verkaik, 'Collapse of Two Rrials Blamed on Jurors' Own Online Research', *The Independent*, August 20th 2008.
[1061] Thomas, *Are Juries Fair*, p. 27.

was "harder and harder" to exclude prejudice from trials because of the internet.[1062] Judges also acknowledge public opinion's possible impact on jurors, e.g. in the Kevin Maxwell case in England, the judge considered public opinion polls presented by the defence and selected jurors by questionnaires and in chamber questioning to ensure an impartial jury.[1063] Apart from questioning potential jurors, judges might also take extra efforts during trials, e.g. American judges explain to jurors the reason for prohibitions and remind them throughout the trials in order to cope with the influences from the internet.[1064]

Jurors are indeed open to media coverage and information on the internet. A study finds that "jurors serving on longer, high profile cases were almost seven times more likely (70%) to recall media coverage of their case than jurors serving on standard cases (11%)", and the two main media resources for jurors in high profile cases are television and national newspapers.[1065] Most jurors did not recall the emphasis of media coverage, however, where they do, "almost all remembered the coverage suggesting that the defendant was guilty".[1066] "In high profile cases, 20% of jurors who recalled media reports of their case said they found it difficult to put these reports out of their mind while serving as a juror".[1067] With regard to the use of the internet, all jurors who admitted they have looked for information about their cases used the internet to search information.[1068] "More jurors on high profile cases admitted to looking for information about their case on the internet during trial than jurors in standard cases."[1069]

However, as Bornstein and Greene noted, "The greatest difficulty in assessing jury decisions—from either a psychological or a legal perspective—is the impossibility, in most cases, of knowing whether the jury reached the 'right' verdict",[1070] which also applies when assessing the impact of publicity on jury decision making. Therefore, they argue that "the question... [is] whether the verdict was reasonable in light of the evidence

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[1062] Verkaik, 'Collapse of Two Trials'.
[1063] Vidmar, 'Historical and Comparative', p. 39-40.
[1064] Nancy S. Marder, 'Two Weeks at the Old Bailey: Jury Lessons from England', *Chicago-Kent Law Review*, Vol. 86, Iss. 2, 2011, p. 572.
[1065] Thomas, *Are Juries Fair*, p. 41.
[1066] ibid, p. 42.
[1067] ibid.
[1068] ibid, p. 43.
[1069] ibid, p. 44.
[1070] Brian H. Bornstein and Edie Greene, 'Jury Decision Making: Implications for and from Psychology', *Current Directions in Psychological Science*, Vol. 20, No. 1, 2011, p. 64.

and the law."[1071] So far, the obtained evidence on publicity's influence on jurors is mixed. A study on the impact of prejudicial publicity on juries in New South Wales, in more than a half of the trials studied, pre-trial publicity was recalled and discussed in jury rooms; during the trials of the cases studied, jurors followed the newspaper coverage and discussed it in jury rooms.[1072] However, most jurors except a few expressed that publicity did not influence them and some stated that publicity of their trials was "inappropriate" or "inadequate"; judges and lawyers also perceived most verdicts of these trials were supported by evidence.[1073] Another study on juries in New South Wales also finds that publicity is very unlikely to influence jurors: almost all jurors assert that publicity will not influence their impartiality in assessing evidence and 83% jurors assert that "the specific publicity had no influence at all on their verdict".[1074]

Despite the mixed evidence, pressure from perceived public opinion and the media could be a risk on impartiality of decision makers, whether they are jurors or judges. Some Chinese scholars are aware that jury has taken a lot of pressure from judges by sharing responsibility or "risk" – giving a verdict on factual issues.[1075] Therefore, they also give their defence of the institutions which are criticised for infringement on judicial independence and open justice, e.g. adjudication committees, based on its practical function of sharing responsibility from judges. For example, when Su Li gives a mild defence for adjudication committees of the primary courts, he argues that most of the interviewed judges have a more positive attitude towards the adjudication committee, and one of his explanations is that judges can resist pressure from their social connections (*guanxi*) and the people that "they cannot afford to offend" e.g. local political leaders.[1076] However, whether it is a judge or a jury or someone else to deliver the verdict, one of them has to confront the pressure and is supposed to deliver an impartial verdict. Simply

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[1071] ibid.
[1072] Johns, 'Recent Developments', p. 41-42.
[1073] ibid, p. 42.
[1074] Michael Chesterman, Janet Chan and Shelley Hampton, *Managing Prejudicial Publicity An empirical study of criminal jury trials in New South Wales* (The Law and Justice Foundation of New South Wales 2001) p. 102.
[1075] Su Li, 'Investigation and Thinking of the Adjudication committee System of the Courts of Grass-roots Level' (基层法院审判委员会制度的考察及思考), *Peking University Law Review*, Vol. 1, No. 2, 1998, p. 345-346.
[1076] ibid, p. 331-332, 345-346.

transferring pressure to a different decision maker without improving the system and protecting decision makers' independence, it is unlikely to make a significant difference.

Findings from the comparison above suggest that there is more than one way to do justice. China is attempting to explore its own way rather than simply follow the West, as the circumstances of each state are different, which is what the Chinese authority often asserts. The culture, historical tradition, custom etc. are different indeed. However, such assertions might not be just an excuse to distance China from the western civilization. It might be an idea which applies either way i.e. China might also have no intention to expand its own system somewhere else due to this idea. A historical example is the former emperor *Qianlong* of the Qing Dynasty's letter to the English King George III. When King George III sent Lord Macartney to China for the establishment of a permanent diplomatic relationship and further trade with China, Emperor *Qianlong* replied, although with a great sense of superiority, that

> If you assert that your reverence for our Celestial Dynasty fills you with a desire to acquire our civilization, our ceremonies and code of laws differ so completely from your own that, even if your Envoy were able to acquire the rudiments of our civilization, you could not possibly transplant our manners and customs to your alien soil.[1077]

This thesis does not disagree to be open minded to other cultures and different experiences; however, whether any legal system from the West is the best possible option for China is an open question. Russell believes that it is

> a profound mistake" that "we (the Europeans) are firmly persuaded that our civilization and our way of life are immeasurably better than any other, so that when we come across a nation like the Chinese, we are convinced that the kindest thing we can do to them is to make them like ourselves.[1078]

Conclusion

China attempts to maintain public participation in the justice system – the People's Assessors' system as a symbol of democratic values, through which the justice system is portrayed as being in touch with the people and responsive to public opinion. They also look at the practice in other jurisdictions to draw justifications on their own institutions

[1077] Bertrand Russell, *The Problem of China* (George Allen & Unwin 1922) p. 50.
[1078] ibid, p. 197.

and practice with their own understandings. The jury and the like institutions are interpreted as democratic institutions in the justice system in China and is used to justify China's own practice. However, the issue of public participation, public opinion and democratic values is very complex as discussed above. The institutions of public participation e.g. the jury in the common law system and the PAs in mainland China are certainly perceived as symbolic of democratic values at some point. However, democracy is a complicated concept in itself. In the context of the common law, this thesis has argued that the democratic values of public participation is not merely the appearance of a number of citizens in court, but the active involvement of citizens which can restrict any perceived abuse of state power. However, democratic values in these terms are not demonstrated in such a way in the justice system of mainland China. As argued above, the People's Assessors' system is rather a symbol of democratic values which the state cannot afford to abandon, as the justice system is out of touch with the people for reasons such as corruption, bureaucracy, miscarriage of justice etc. It is hard to see any prospect of a justice system of the people and for the people until an independent judiciary is established to stand between the state and the citizens. Democratic values in the justice system are indispensible to China's "socialist" ideology, and therefore some institutions must be operated to deliver positive images of legitimacy to the Chinese people. Therefore, China has been taking efforts to revive the People's Assessors' system although it is in continuing decline in practice. If this system fundamentally lacks democracy (e.g. the legislature – the People's Congress is criticised of being lack of democracy and law making lacks genuine public participation), it has to make it up somewhere else.

In England where the jury system originates from, the jury is in continuing decline. It is only used in a very small percentage of cases but remains as a symbolic embodiment of a democratic institution. As previously discussed in the chapter, it cannot be taken granted that the jury is always a democratic institution. The English jury was not open to the entire public until the requirement of property owning was abolished, and the early English jury also suffered from ordeals and could not restrict the state power as much as it can nowadays. Nonetheless, the contemporary English jury still confronts other controversial issues affecting the degree of its democratic value, e.g. representativeness of different race and social demographic groups in jury service, how far citizens would like

to avoid jury service etc. Democracy does not always have a positive impact on legitimacy, e.g. as discussed previously that the punitiveness of the US criminal justice is partly attributed to a democratic impact. Despite all of the controversies about the jury and continuing restrictions on the right to jury trials, it is still kept as a symbol. The right to a jury trial has deep roots in the culture and also constitutes part of the ideology.

Both China and England's experience with their own public participation institutions suggest that legal values and institutions are not only influenced by culture, but could also be powerfully influenced by politics and ideology. However much they are in decline or however little their expected features and values are translated into practice, they are still powerfully constructed by ideology. In this context, with regard to public opinion and its connection to the justice system, the term "public opinion" sometimes is beyond what it literally suggests. It could be an attitude demonstrating awareness of the significance of public confidence and/or being responsive to public opinion.

CONCLUSION

In recent years in mainland China, a number of high profile cases have attracted extensive attention from the public and have received intense opinions and even outrage, which have put judges under great public pressure. Under such circumstances, the Chinese scholars have expressed their concerns that public opinion has influenced judges' decision making and, therefore, compromised the fundamental values of the rule of law such as judicial impartiality and independence. The state and the CPC is concerned that frustrating the public in high profile cases will diminish public confidence and might even trigger riots or mass incidents and cause problems of social stability in the worst circumstances. A dilemma appears to be that the Chinese judges have to bow to public opinion for the sake of preserving public confidence but compromise their impartiality and independence or they give the right judgment in light of law and evidence but frustrate the public and risk reducing public confidence. Furthermore, this phenomenon is theorised as a tension between freedom of speech and judicial impartiality and independence. Most Chinese research literature on this issue is developed upon this. When tracking the causes of this dilemma, the Chinese scholars criticise the public for being misinformed and lacking an understanding of law and the justice system, and therefore a popular prescription from both the Chinese scholarship and the state is to "direct" public opinion to a "correct" direction.

At first glance, the problem appears to have arisen that public opinion or public pressure has compromised the fundamental values of the rule of law in China, because a number of high profile cases have eventually received a judgment which quenched the public outrage, which is discussed in Chapter 1. However, in Chapter 1, this thesis has also found that not all like high profile cases appear to be treated alike, and it cannot always conclude that the court is always influenced by public opinion at the cases which have raised the concerns of the public in mainland China. Particularly, the state and the CPC tend to take a hard line in sensitive cases. Therefore, this thesis has decided to go beyond the outward tension between public opinion and judicial impartiality and independence theorised by the Chinese scholarship, and has taken a different approach to

the issue by: 1) analyzing the imported terms “judicial impartiality” and “judicial independence” etc. used in the Chinese literature in light of the western conventional wisdom and searching the variable nuances of the same legal rhetoric in different contexts; 2) analyzing what contributes to the problematic situation of judicial impartiality and independence in China’s justice system and whether public opinion is the major concern; 3) instead of concentrating on the influence of public opinion, analyzing what influences that public opinion is subject to and examining how far the term “public opinion” is a rhetorical construction; 4) analysing the perplexing values regarding public opinion in China’s state ideology which are not translated into the practice. This different approach has led to the discovery of more complex factors about public opinion, public confidence, and the justice system than those that have often been taken granted, especially as regards the actual implication of “public opinion” in a variety of contexts and variation of the legal values and institutions of the same rhetoric in different political and culture contexts, where the normative contribution to knowledge of this thesis comes from.

Before the critical review goes any further, this thesis has set up the basis for this critique in Chapter 2, inspired by the Anglo-American jurisprudence. It is against the rule of law if a judge gives a judgement because he/she perceives that it could please the public, as 1) public opinion often is a variety of different opinions and it would be illegitimate to adopt any particular social group’s opinion instead of the law passed by a democratic legislature; 2) the parties have a right to an independent and impartial tribunal, and their case should be decided by those whom it is presented to and before whom it is argued; 3) even if a majoritarian opinion is perceived, application of such opinion would undermine protection of human rights against the majority’s oppression which is a fundamental value of the rule of law.

However, judicial impartiality is implemented in a distinctive way in China for both cultural and political reasons. The fidelity towards party doctrines and interests has penetrated into all facets of the justice system of China. This has diminished the actual and apparent impartiality of the Chinese judges and has affected their performance, which is responsible for an increasing lack of public confidence. Therefore, instead of embracing any perceived public consensus or selected opinions in selected cases as a strategy for addressing the symptoms of lack of public confidence, it might be an option to address

this problem by establishing an impartial and independent judiciary. It is not unusual that the Chinese judges arrange press conference to explain their judgments in some high profile cases in an attempt to make them more persuasive. A number of jurisdictions have also adopted a more proactive approach to improve the communication between the court and the public rather than staying silent. However, this should be on the premise that the judgments in these highly controversial cases should be well reasoned and accessible to the public, which is largely ignored in China. Not in every jurisdiction do judges give very detailed reasoning for their decision e.g. France, however, the French judges has still received criticisms from the French scholarship. Although one might argue that "very detailed reasoning" might relate more to the needs of the legal profession than those of the public, this thesis argues that if "justice must be seen to be done", the reasoning of judgments should be as clear and accessible as possible.

In Chapter 2, it has been shown that several western jurisdictions have also established press offices or other institutions for improving communication between the court and the public/media. However, these studied jurisdictions have established an independent judiciary in order to secure impartiality. A judgment that appears to be or actually is given partially can hardly be made persuasive to the public no matter how many efforts are taken to communicate with the public, if the public is convinced in the first place. With regard to China, one of the causes for the problem of judicial impartiality is the problem of judicial independence. In Chapter 3, this thesis has studied what has compromised judicial independence in China and has found that public opinion is not the major concern. Instead, the powerful external influence from the CPC and the government and the internal influence within the justice system e.g. the adjudication committee contribute most to the problem of judicial independence. The subordination of the interest of justice to the interest of the ruling CPC and its government is responsible for a lack of both the institutional independence of the court and the independence of individual judges.

What is actually able to undermine judicial independence in China is also revealed by the dynamics of how public opinion could possibly eventually influence the decision making in individual cases. As studied in Chapter 3, intense public attention or discontent could raise the CPC's or the government's concern about social stability, and they might instruct the judge to decide the case in a particular way to quench public outrage, provided

that the case is not a sensitive case and is politically negotiable. It is unlikely to foresee an independent judiciary in an authoritarian country and, therefore, an authoritarian regime might have to appeal to such strategies to allay the phenomenon of the crisis of public confidence. A social context for this explanation is the social unrest in China, which is also studied in Chapter 3 and where intense public discontent could jeopardize social stability. However, such dynamics would reinforce the influences which undermine judicial independence, even if a fairer decision is achieved in individual cases. Moreover, as the Chinese authority is selectively responsive, what counts as public opinion depends on what it would like to respond to, which could be the perceived majoritian opinion or opinions of elites because of their ascendency, and the opinions of disadvantaged social groups might remain unheard, though they too are sources of public confidence. At this point, this thesis has established that public opinion is not the major concern for judicial impartiality and judicial independence, which is the first step that this thesis has taken to critically review the consensus of the Chinese research literature on this issue.

In an attempt to mobilize public confidence and reduce the risk of intense public discontent, China is making efforts to revive the institution of public participation i.e. the People's Assessors' system (although it is in decline in practice) and several provinces have established the pilot People's Jury, which serves as a symbol of democratic values and legitimacy for China's justice system. It is also portrayed as an intuition to introduce public opinion into the judicial decision making process, or it serves as a barometer of public opinion (e.g. the pilot People's Jury) and thereby as a means to secure more public support. In other western jurisdictions studied in this thesis, public participation, e.g. the jury, is regarded as an opportunity for members from the general public to be better informed about the justice system and to be aware that a legal case could be a more complicated story than presented in media coverage, therefore public confidence is expected to be improved through citizens' involvement. However, in the Chinese forms of public participation, the PAs and the pilot People's Jurors are not always randomly selected members from the general public, and have problems of representativeness to different degrees. It is doubtful how far such democratic symbolism could improve public confidence. At this point, a significant issue starts to be involved in this analysis – public confidence. Therefore, this thesis has moved on to the study of public confidence and public opinion in light of the principle of open justice in Chapter 4.

As previously argued in Chapter 4, from the experience of other jurisdictions, the main resource of public confidence is people's experience with the justice system and the stories of other people's experience. Only when such experience is not available, they will turn to the media as an alternative information resource. Therefore, it challenges a widely shared assumption: that the problem of public confidence is caused by an ill-informed public and their misunderstanding of law and the justice system and providing more information e.g. through public legal education can improve public confidence. More information does not necessarily improve public confidence. If the law or the justice system has problems, people could possibly learn from their experience or stories of other people's experience, or media coverage. Under such circumstances, more information might even diminish public confidence. This argument is applicable in China. Various problems in China's justice system such as scandals of miscarriage of justice, corruption, lack of transparency etc. have already caused grave damage to public confidence in the justice system. Therefore, in controversial high profile cases, judges might invite suspicions from the public if they do not decide the case in the way which the majority of the public perceive to be fair. Politically sophisticated judges are also concerned about any possible petitions or mass incidents which might be fuelled by an unpopular judgment, and its potential negative impact on their career, as they are not independent and could be removed from their office – or "held accountable" -- by the CPC to demonstrate that the CPC stands with the Chinese people. The public discontent about the general performance of the justice system, associated with a lack of judicial independence, has put the Chinese judges in a much more vulnerable position when confronting public pressure than their western peers. Therefore, the issue of the tension between public opinion and the justice system is not as simple as asserting that judges should develop a thick skin or the public should be better informed.

Furthermore, how well the public could be informed depends on how open the justice system is. A justice system which lacks transparency and openness will skew public opinion, impede public scrutiny, and eventually jeopardize public confidence. In Chapter 4, it has been established that China's justice system still maintains a strong secrecy feature and lacks transparency, which is also revealed in a number of high profile cases studied in this thesis. These factors, along with the problems of impartiality and independence of the judiciary which has been studied, have established the conditions for

a frustrated public. A sealed off justice system will lead to limited reliable information resources, and thereby will skew public opinion. In China, what leads to a misinformed public is distinctive from the western jurisdictions studied in this thesis e.g. England. In the western jurisdictions that this thesis has discussed, the major cause for a misinformed public is the media especially the tabloid's influence. The media present sensational stories of crime to the public to catch their attention and are often driven by an attempt to increase market share, which misleads the public with illusions such as: the criminal justice system fails to reduce crime while criminologists find that the crime rate is actually reducing; judges are too lenient to offenders etc. Under such circumstances, the strategy is to provide more balanced information to the public e.g. through public legal education projects, which are less applicable in China. At this point, a crucial issue arises over whether public opinion could possibly be restricted or moulded through control of information resources or even constructed in an authoritarian state. This thesis has then moved on with studying this issue in Chapter 5.

China's justice system is lacking in transparency and openness and as a result reliable information resources are restricted. Under such circumstances, media coverage and the diverse information e.g. grapevine news on the internet become important information resources, which are studied in Chapter 5. In China's state ideology, one of the many important functions carried by the media is the "supervision by public opinion" which literally means public scrutiny through free expression. However, ironically, the Chinese media is commercialized with limited independence and freedom and still is subject to censorship, as an out-spoken media is perceived to impinge on the image and interests of the ruling CPC. In sensitive cases, the media have to stay mute or are only allowed to publish the "standard draft" (*tonggao*) provided by the state news agency – *Xinhua* News Agency. Censored media would also skew public opinion, and the "supervision by public opinion" is in fact under the supervision of the state and thereby cannot constitute an independent check on state power, including judicial power. The flow of information brought about by the dramatic development of the internet in China has challenged the traditional paper media censorship, as it has increased the difficulty to control information and comments. However, it still remains possible to control online information, as the internet has also received rigid censorship. A number of Chinese citizens have been punished for their postings on the internet, which has sent a message of

deterrence to any potential trouble makers. In order to dilute critical speech on the internet for a better image, local governments and courts even hired "internet commentators" to post positive comments anonymously on the internet. Under such circumstances, the state is directly involved in constructing public opinion, which increases the difficulty to discover what public opinion really is. Therefore, as previously argued in Chapter 5, the difficulty of recognizing public opinion also provides an opportunity for the authority to "represent" public opinion – asserting public opinion is what they would like it to be and sometimes the term "public opinion" in the authority's statement becomes a rhetorical tool to justify that a certain legal policy is based on popular support and for public interests.

The critical review of this thesis has not terminated at this step. China's obsession about the tension between public opinion and judicial impartiality and independence is derived from its distinctive understanding of democratic values of the justice system and its co-relation with public opinion. Their theoretical basis for public opinion's necessary connection to the justice system is that a legitimate – especially a legitimate socialist – justice system should maintain democratic values, which also constitutes the justification for public participation in the justice system, as asserted by the Chinese scholars (see the literature review and also the discussion in Chapter 6). In order to give a more in-depth understanding of China's situation and also a further critique of the debate within the Chinese scholarship, this thesis has discussed democratic values and public participation in the justice system from a comparative perspective, including both common law jurisdictions e.g. England, and also a jurisdiction which shares more similarities in cultural aspects, namely Japan. In Chapter 6, this thesis has established that democratic values in a liberal democracy indicate genuine public engagement in the justice system which enables the public to challenge any perceived abuse of state power. However, in an authoritarian country like China, democratic values are translated into the appearance of the justice system's connection with the people e.g. institutions of public participation – the PAs and its response to public opinion rather than restrictions on the state power through democratic institutions. Therefore, the theoretical basis for the justice system's connection with the actual public opinion, argued by the Chinese scholarship, is absent. In other words, this theoretical basis is ideologically constructed for an ideologically constructed "public opinion".

In summary, public opinion could indirectly influence China's justice system under some circumstances; however, it is also subject to strong influences from the media which are still controlled by the state and from information on the internet which is under rigid censorship. Public opinion is even constructed in China through a number of ways as studied in this thesis: 1) as discussed in Chapter 1 and 3, not every high profile case's decision has pleased the public, the authority only selectively respond to popular pressure if they perceive such response could mobilize public support and will not diminish or compromise their power; therefore what constitutes "public opinion" is subject to what the authority or the CPC is concerned about and would like to respond to, and provides the CPC a chance to assert what public opinion is and portrays itself as representing public opinion to construct democratic support for its legal policy; 2) as studied in Chapters 4 and 5, restricted reliable information resources -- information which could be released by the court and censorship of alternative information resources e.g. media and the internet has skewed public opinion; 3) as discussed in Chapter 5, local government and the courts hire "internet commentators" to post positive messages and dilute negative speeches on the internet anonymously, which appears to be opinions from the public; 4) as studied in Chapter 3 and argued in Chapter 6, the institutions of public participation – the PAs and the pilot People's Jury remain as important symbolic democratic values that seek to add to the legitimacy of this socialist justice system and are also justified as institutionally introducing public opinion into the justice system; however, the problems of representativeness of the PAs and pilot jurors suggest that "public opinion" in this context becomes an ideological rhetoric for the appearance of connections between the justice system and the public.

The core finding of this thesis is that the current discussion on the tension between public opinion and judicial impartiality within Chinese scholarship uses the term "public opinion" as a loose concept which is in need of further clarification, and it ignores the variation of the substance of the term "public opinion" in different contexts, e.g. public confidence, or opinions led by the elites and branded as "public opinion"; at the same time, it fails to develop its argument on a clear position of whether public opinion should be adopted in the judicial decision making process, and therefore leads to the struggle of looking for the balance between public opinion and judicial impartiality or which is theorised by them to be the tension between the freedom of speech and the fundamental

values of the rule of law such as judicial impartiality/judicial independence; moreover, such approach ignores a crucial fact of the malleability of public opinion i.e. public opinion itself is also subject to various influences, e.g. restrictions of access to information resources, censorship, the propaganda strategy employed by the authoritarian regime, etc. This thesis has studied the dynamics between public opinion and the judicial decision making process not only in China's distinct cultural and social context but also its distinct political ideological context, as the political ideology also acts as a powerful factor shaping the legal system and public opinion or the appearance of public opinion.

Based on all of these findings, this thesis tempts to argue that the Chinese debate on the tension between public opinion and judicial impartiality and independence is groundless and therefore is a pseudo debate. This debate overlooks the real problems which have undermined impartiality and independence of the Chinese judiciary and also public confidence in the justice system. The prescriptions based on the assumption of a tension between public opinion/freedom of speech and the fundamental values of the rule of law are less likely to have their expected positive effect on these real problems.

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